No. 12440

United States Court of Appeals

For the Ninth Circuit

HUGO V. LOEWI, INC., a corporation,
Appellant,
vs.
FRED GESCHWILL,
Appellee.

Brief for Appellee

Upon Appeal from the United States District Court for the District of Oregon.

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FILED
JUL 2 1950
PAUL P. O'BRIEN,
CLERK

HOUGHTON-CARSON COMPANY, PRINTERS, PORTLAND OREGON

SUBJECT INDEX

Page

STATEMENT OF THE CASE

The action is for the balance due on hops bought under contract by appellant dealer from appellee grower 1

Consolidation of records in this and two other companion cases 2

Appellant's specifications of asserted error 3

The issues 4

Narrative statement of facts 5

ARGUMENT

Summary 18

I. Issue on quality of the hops. The trial Court's finding that the hops substantially conformed to the contract is clearly supported by the evidence 19

Appellant's contention that this Court should retry the facts 20

Appellant's contention that the trade terms in the contract should be given meanings different from those understood by the parties 21

The trial Court's finding that the hops were merchantable 30

The trial Court's finding that the hops were such as were actually accepted by the trade under such contracts 34

Appellant's "assumption of risk" argument 35

Appellant's subsidiary contentions and authorities 37

The trial Court's holding that, having bought the hops knowing of the mildew, appellant cannot reject them on that ground 40

Appellant cannot assert a claimed warranty on which it did not rely 41

Appellant cannot claim a warranty which it induced appellee to believe it would not rely on 44

II. Issue on form of action. Appellee, having fully performed the contract and having made a valid tender of the hops, can maintain this action to recover the balance due on the contract 46

Page

A. Application of Sales Act 48

(1) The "property" in the hops passed to the buyer, and the seller may maintain his action for the balance of the purchase price under §63(1) of the Sales Act 49

The property in the specific goods passed to the buyer when the buyer completed the acts to be done by him to put the goods in deliverable state, and delivered them 50

Appellant's contention that it prevented the property in the hops from passing simply by refusing to accept and pay for them 53

Appellant's contention that this was a "cash sale", and that in such a sale where the buyer wrongfully violates its promise to pay for the goods it cannot be held for the purchase price 57

Appellant's argument that a conditional title passed to it, but was later revested in the seller 58

(2) Even if appellant's theory were correct that the "property" in the hops had not passed to the buyer, still the seller's action for the balance of the purchase price could be maintained under §63(3) of the Sales Act 60

B. Application of contractual "liquidated damages" provision 64

Provisions of the contract relating to various remedies 64

Appellant's argument on "liquidated damages" clause —if the buyer wrongfully violated the contract, the seller would be entitled to no recovery at all 65

Such interpretation of the clause would nullify other provisions of the contract, and is contrary to the intent of the parties 67

The clause is not applicable to these facts 70

Appellant cannot assert such a construction of the clause 71

Appellant's construction is not in accord with Oregon cases interpreting similar clauses 71

Page

The "liquidated damages" clause gives appellant no license to repudiate its contract with impunity 73

CONCLUSION 75

Appendix—Containing the trial Court's findings of fact and citations to the record supporting the findings on the 17 points on which appellant asserts error.

TABLE OF CASES AND OTHER AUTHORITIES

Decisions

(The asterisks indicate the hop cases)

Page

Abilene Nat. Bank v. Nodine, 26 Or. 53, 37 Pac. 47 41-42

Armstrong v. Stiffler, 189 Md. 630, 56 A. 2d 808 74

Attorney-General v. Drummond, 1 Dr. & War. 353, aff'd 2 H. L. Cas. 837 35

Breden v. Johnson, 56 N.D. 921, 219 N.W. 946 50

Brigham v. Hibbard, 28 Or. 386, 43 Pac. 383 ..... 48, 56-57

Burton v. O.-W. R. & N. Co., 148 Or. 648, 38 P. 2d 72 35

Call v. Linn, 112 Or. 1, 228 Pac. 127 46

*Catlin v. Jones, 48 Or. 158, 85 Pac. 515 26

*Daniels v. Morris, 65 Or. 289, 130 Pac. 397, 132 Pac. 958 ..... 27-28, 46-47, 71-73

Delaware, Lackawanna & Western R. R. Co. v. U. S., 231 U.S. 363, 34 S. Ct. 65, 58 L. Ed. 269 52

Dickerson v. Colgrove, 100 U.S. 578, 25 L. Ed. 618 45

Dorsey v. Oregon Motor Stages, 183 Or. 494, 194 P. 2d 967 25

*Dustan v. McAndrew, 44 N.Y. 72 46

Electrical Products Corp. v. Ziegler Drug Stores, 141 Or. 117, 10 P. 2d 910, 15 P. 2d 1078 ..... 66, 70

Faxton v. Faxon, 28 Mich. 159 45

Fischer v. Means, 88 Cal. App. 2d 137, 198 P. 2d 389 50

Fried v. Fisher, 328 Pa. 497, 196 Atl. 39 45

Page

*Gonter v. Klaber & Co., 67 Wash. 84, 120 Pac. 533 ... 42-43

Heid Bros. v. Carver, 94 Colo. 51, 27 P. 2d 756 ... 45

Henry Glass & Co. v. Misroch, 239 N.Y. 475, 147 N.E. 71 ... 52, 59-60

Hockersmith v. Hanley, 29 Or. 27, 44 Pac. 497 ... 71

Hurst v. Lake & Co., Inc., 141 Or. 306, 16 P. 2d 627 ... 25

Inland Seed Co. v. Washington-Idaho Seed Co., 160 Wash. 244, 294 Pac. 991 ... 50

Jacobs v. McCalley, 8 Or. 124 ... 67

Johnson v. Iankovetz, 57 Or. 24, 102 Pac. 799, 110 Pac. 398, 29 L.R.A. (N.S.) 709 ... 58

Katz v. Delohery Hat Co., 97 Conn. 665, 118 Atl. 88 ... 51, 56

Keegan v. Lenzie, 171 Or. 194, 135 P. 2d 717 ... 58

Kenney v. Grogan, 17 Cal. App. 527, 120 Pac. 433 ... 50

Kraig v. Benjamin, 111 Conn. 297, 149 Atl. 687 ... 41

*Krebs Hop Co. v. Livesley, 59 Or. 574, 118 Pac. 165, Ann. Cas. 1913C, 758 ... 46

*Lachmund v. Lope Sing, 54 Or. 106, 102 Pac. 598 ... 26-27

Lannom Mfg. Co. v. Strauss Co., 235 Iowa 97, 15 N.W. 2d 899 ... 63

*Lehman v. Salzgeber, C.C.D. Or., 124 Fed. 479 ... 55-56

*Lilienthal v. Cartwright, 9 Cir., 173 Fed. 580 ... 45

*Lilienthal v. McCormick, C.C.D. Or., 86 Fed. 100 ... 26

*Lilienthal v. McCormick, 9 Cir., 117 Fed. 89 ... 69

*Livesley v. Heise, 45 Or. 148, 76 Pac. 952 ... 6, 48

*Livesley v. Johnston, 45 Or. 30, 76 Pac. 13, 946, 65 L.R.A. 783, 106 Am. St. Rep. 647 ... 6, 37, 39, 48, 55

Loose v. Flickinger, 121 Cal. App. 77, 8 P. 2d 517 ... 44

Marshall v. Wilson, 175 Or. 506, 154 P. 2d 547 ... 45

Mayes v. Stephens, 38 Or. 512, 63 Pac. 760, 64 Pac. 319 ... 67

*McNeff v. Southern Pacific Co., 61 Or. 22, 120 Pac. 6 ... 63, 69, 71

TABLE OF CASES AND OTHER AUTHORITIES —Continued

Page

*Netter v. Edmunson, 71 Or. 604, 143 Pac. 636 ... 26

*Pabst Brewing Co. v. E. Clemens Horst Co., 9 Cir., 229 Fed. 913, cert. den. 212 U.S. 637 ... 47

Paul v. Salisian, 87 Cal. App. 721, 262 Pac. 779 ... 44

Pittenger Equipment Co. v. Timber Structures, Inc., 50 Or. Adv. Sh. 625, 217 P. 2d 770 ... 39-40, 48

Pratt Chuck Co. v. Crescent Insulated Wire & Cable Co., 2 Cir., 33 F. 2d 269 ... 48, 63-64

Prestige, Inc. v. Schwartzberg, Inc. (La. App.), 38 So. 2d 169 ... 34

*Seidenberg v. Tautfest, 155 Or. 420, 64 P. 2d 534 ... 21, 38, 52, 63

Sheehan v. McKinstry, 105 Or. 473, 210 Pac. 167 ... 37

Standard Cotton-Seed Oil Co. v. Excelsior Refining Co., 47 La. Ann. 781, 17 So. 303, 49 Am. St. Rep. 386 ... 43-44

Stevenson v. Puget Sound Vegetable Grower's Ass'n, 172 Wash. 196, 19 P. 2d 925 ... 48

Tomita v. Johnson, 49 Idaho 643, 290 Pac. 395 ... 41

Turner v. Benz Bros. & Co., 153 Wash. 123, 279 Pac. 398 ... 50

Union Pac. R. Co. v. Chicago, R. I. & P. R. Co., 163 U.S. 564, 16 S. Ct. 1173, 41 L. Ed. 265 ... 74

Urbansky v. Kutinsky, 86 Conn. 22, 84 Atl. 317 ... 53

Weyerhaeuser Co. v. First Nat. Bank, 150 Or. 172, 38 P. 2d 48, 43 P. 2d 1078 ... 57-58

*Wigan v. La Follett, 84 Or. 488, 165 Pac. 579 ... 7, 25-26, 67-68

Wilhelm v. Eaves, 21 Or. 194, 27 Pac. 1053, 14 L.R.A. 297 ... 66

*Wolf v. Edmunson, 9 Cir., 240 Fed. 53 ... 3, 31

Worthington v. Gwin, 119 Ala. 44, 24 So. 739, 43 L.R.A. 382 ... 43

STATUTES AND RULES

(Italics indicate the pages on which statutes or rules are quoted)

	Page
Federal Rules of Civil Procedure	
Rule 52(a)	*21*
Oregon Compiled Laws Annotated	
§2-214	*24*
§2-218	*24*
§2-219	*24-25*
§23-524	17, 63, *67*
§71-112	*41*
§71-115(3)	*41*
§71-119	*50*, 58-59
§71-141	*49*
§71-151	48
§71-152	*52*
§71-153	*52*
§71-154(2)	*52*
§71-160	53
§71-163(1)	48, *49*
§71-163(3)	48, 49, *60*
§71-164	48, 60, *61*, 71
§71-176	*39*
§72-103	*38*

OTHER AUTHORITIES

	Page
Anson on Contracts (Corbin's Ed., 1919)	
§351	25
Black's Law Dictionary (3d Ed.)	
"Merchantable"	32
Restatement of Contracts	
§246 and Ill. 7	25
§248 and Ill. 5	25
§309	37
Walsh on Equity	
§68	74
Wigmore on Evidence (3d Ed.)	
§2460	25
Williston on Contracts (Rev. Ed.)	
§650	25
§675A	54
§677	54
§688	37
§1364	54-55
Williston on Sales (Rev. Ed.)	
§191c	37
§265	50-51
§269	51
§505	52

Who's Who in the Record[1]

Name of Witness	Called by	Record
Aman, Wilbert Hop grower.	Pltf.	S.R. 187-194
Becker, Caspar Hop inspector for Ralph Williams, an Oregon hop dealer.	Pltf.	G.R. 285-290
Bullis, D. E. Chemist and hop-analyst, Experiment Station, Oregon State College.	Pltf.	S.R. 326-343
Byers, James A. Employee of C. W. Paulus, local representative of appellant Hugo V. Loewi, Inc.	Deft.	S.R. 219-228
Cornoyer, H. A. Oregon hop dealer.	Pltf.	S.R. 177-187
Davis, Gilbert Field man for A. J. Ray & Son, Inc., local representative of appellant John I. Haas, Inc.	Deft.	W.R. 346-369
Eismann, Howard Local representative of S. S. Steiner, Inc., which, in addition to Loewi and Haas, is the other of the three large hop buyers in the country.	Deft. Deft.	S.R. 284-290 W.R. 372-388

1 While the number of experts that could be called was limited (G.R. 216, 289; S.R. 178-180), even so the consolidated record contains the testimony of 34 different witnesses, some of whom testified more than once. This table has been included to facilitate consideration of the testimony by identifying the various witnesses and giving the record references to their testimony.

The abbreviations used to designate the printed portions of the consolidated record are based upon the initial of the name of the respective appellee:

G.R.—Record printed in Hugo v. Loewi, Inc. v. Geschwill, No. 12440.

S.R.—Record printed in Hugo v. Loewi, Inc. v. Smith, No. 12441.

W.R.—Record printed in John I. Haas, Inc. v. Wellman, No. 12442.

Who's Who in the Record—Continued

Name of Witness	*Called by*	*Record*
Faulhaber, Joseph Chief of Police of Mount Angel, Oregon, and formerly a hop grower.	Pltf.	G.R. 200-206
Fournier, James H. Manager of Mt. Angel Branch, United States National Bank of Portland.	Pltf.	G.R. 194-200
Franklin, H. F. Nut grower and former hop inspector.	Deft. Deft.	G.R. 409-412 492-496 W.R. 393-395
Fry, Lamont Field man and inspector for C. W. Paulus, local representative of appellant Hugo V. Loewi, Inc.	Deft. Deft.	G.R. 291-318 S.R. 194-219
Geschwill, Fred Hop grower, plaintiff-appellee in Hugo V. Loewi, Inc. v. Geschwill.	Pltf.	G.R. 70-193 496-501
Glatt, Ray J. Hop grower.	Pltf.	W.R. 120-129 421-428
Haas, Frederick J. Vice-President of appellant John I. Haas, Inc.	Deft.	W.R. 441-470
Hoerner, G. R. Plant bacteriologist employed by Extension Service, Oregon State College and U. S. Department of Agriculture.	Deft. Deft.	G.R. 365-370 375-387 503 S.R. 266-272
Keber, Joseph J. Retired banker and hop grower.	Pltf.	W.R. 129-150
Matheson, Catherine Stenographer in Hillsboro office of A. J. Ray & Son, local representative of appellant John I. Haas, Inc.	Deft.	W.R. 271-275
Netter, Ernest Hop inspector for Ralph Williams, an Oregon hop dealer.	Deft.	G.R. 319-322

Name of Witness	*Called by*		*Record*
Noakes, C. F. — Vice-President, Director and Manager of Salem office of A. J. Ray & Son, local representative of appellant John I. Haas, Inc.	Deft.	W.R.	276-341
Oppenheim, Robert — President of appellant Hugo V. Loewi, Inc.	Deft.	G.R.	421-477
	Deft.	S.R.	290-324
Paulus, C. W. — Local representative of appellant Hugo V. Loewi, Inc.	Deft.	G.R.	322-364 371-374
	Deft.	S.R.	228-266 274-277
Ray, Harold W. — President of A. J. Ray & Son, a corporation, local representative of appellant John I. Haas, Inc.	Deft.	G.R.	391-409 481-492
	Deft.	S.R.	272-274 277-284
	Deft.	W.R.	163-257 417-418 435-438
Schlottman, O. J. — Hop grower.	Pltf.	W.R.	157-162
Schwind, Edward — Brewmaster, at time in question with Lucky Lager Brewery, Vancouver, Washington.	Pltf.	G.R.	206-216
Smith, Kilian W. — Hop grower, plaintiff-appellee in Hugo V. Loewi, Inc. v. Smith.	Pltf.	S.R.	94-177 325-326
	Pltf.	W.R.	429-435
Sprauer, Karl — Foreman of Mt. Angel College farm, in charge of College hop yard and hop-picking machine.	Pltf.	G.R.	217-241
Townsend, Emma L. — Secretary and Office Manager of A. J. Ray & Son, local representative of appellant John I. Haas, Inc.	Deft.	W.R.	257-271

Who's Who in the Record—Continued

Name of Witness	*Called by*	*Record*
Troxel, Ronald Hop inspector for A. J. Ray & Son, local representative of appellant John I. Haas, Inc.	Deft.	W.R. 389-392
Walker, R. M. Hop grower.	Pltf.	G.R. 211-285
Weathers, Earl Hop inspector for C. W. Paulus, local representative of appellant Hugo V. Loewi, Inc.	Deft.	G.R. 387-391
Wellman, O. L. Hop grower, plaintiff-appellee in John I. Haas, Inc. v. Wellman.	Pltf.	W.R. 57-120 396-416
Whitlock, Bert W. In charge of hop leaf-and-stem and seed analysis work on the Pacific Coast for U. S. Department of Agriculture.	Deft. Deft.	G.R. 478-480 W.R. 341-346
Willig, E. F. Manager of Oregon Hop Producers Co-operative.	Pltf.	W.R. 150-157
Williams, Ralph E., Jr. Oregon hop dealer.	Deft. Deft.	G.R. 412-420 W.R. 370-372

No. 12440

United States Court of Appeals
For the Ninth Circuit

HUGO V. LOEWI, INC., a corporation,
Appellant,
vs.
FRED GESCHWILL,
Appellee.

Brief for Appellee

Upon Appeal from the United States District Court for the District of Oregon.

STATEMENT OF THE CASE

This is an action to recover the balance due on the purchase price of hops which defendant-appellant bought under contract from plaintiff-appellee.

The action was commenced in the State Court, and was removed to the Federal Court by appellant on the ground of diversity (G.R. 17-23). Both parties waived jury trial, and all issues were tried by the Court. The Court thereafter entered judgment for plaintiff-appellee, based upon findings of fact and conclusions of law (G.R. 34-44).

Consolidation of Records

On trial it appeared that this action involved common questions of law and fact with two other cases then pending before the Court (and now also on appeal to this Court *sub nom.* Hugo v. Loewi, Inc., Appellant, v. Smith, Appellee, No. 12441, and John I. Haas, Inc., Appellant, v. Wellman, Appellee, No. 12442). Accordingly the parties consented and the District Court ordered that the three actions be tried jointly and that the evidence in any of the actions should be deemed to have been taken and should be considered in each of the others to the extent that such evidence was pertinent, material and relevant (G.R. 34-35, 504; S.R. 47-48, 179; W.R. 9, 409-410).[2]

This Court has entered orders in the three cases:

(a) Permitting the documentary exhibits to be considered in their original form without printing or otherwise reproducing them (G.R. 512-513; S.R. 346-347; W.R. 477-478).

(b) Consolidating, for the purposes of the appeal, the record in each case with the records in the other two cases, to the extent that the evidence, exhibits and proceedings contained in the records on appeal in all three cases may be

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2 In order to avoid unwieldy references, the following abbreviations are used to refer to the various parts of the consolidated record:

G. R.—"Geschwill Record," meaning that portion of the consolidated record printed in the case of Hugo V. Loewi, Inc. v. Geschwill, No. 12440.

S. R.—"Smith Record," meaning that portion of the consolidated record printed in the case of Hugo V. Loewi, Inc. v. Smith, No. 12441.

W. R.—"Wellman Record," meaning that portion of the consolidated record printed in the case of John I. Haas, Inc. v. Wellman, No. 12442.

considered as a part of the record in each case, and without duplication of printing (G.R. 515-518; S.R. 354-357; W.R. 480-484).

(c) Permitting cross-references to be made among the briefs in the three cases.

Specifications of Asserted Error

Of the 42 points on which appellant first intended to rely on appeal in this case (G.R. 49-58), 17 were abandoned and appellant's brief contains only 25 specifications of asserted error.[3] Of Appellant's 25 specifications of asserted error (Br. 10-18), the first 17 relate to the findings of fact, six relate to the conclusions of law, and two relate to other legal points.

Since there are many assertions of error directed to the findings of the District Court, the findings are set out in their entirety in the Appendix to this brief with citations to the record on each contested point, for the purpose of showing in an orderly form that the findings are supported by the evidence.[4]

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3 The points (G.R. 49-58) on which appellant no longer relies, and which have not been made specifications, are Nos. 4, 5, 6, 10, 11, 15, 31 and 33-42.

4 Appellant's brief (pp. 3, 32, 36, 60) states that the trial Court adopted in large part a draft of findings submitted by counsel. In fact, the trial Court heard oral arguments; considered extensive briefs on the facts and the law; handed down his memorandum of decision; considered drafts of findings submitted by both parties, together with appellant's objections to appellee's draft; heard oral arguments thereon; and subsequently entered findings and conclusions drafted by appellee, with one change. (See docket entries: G.R. 66-67; S.R. 84-85; W.R. 49-50.) By that change the Court improved the findings by striking out some repetitious matter at the end of paragraph 11 (G.R. 39), and substituting in lieu thereof the ultimate finding: "Said hops when tendered were merchantable." As this Court held in an earlier hop case, *Wolf v. Edmunson,* 240 Fed. 53, 59, that was the final question of fact for determination on the quality issue.

The Issues

Though appellant has specified 25 grounds of asserted error (Br. 10-18), and has nine subdivisions to its argument(Br. 18-20), the "ultimate" issues proposed by appellant (Br. 4) are two: One relates to the commercial quality of the hops; the other, to appellee's form of relief and measure of recovery. On these two basic issues our position is, succinctly, as follows:

(1) *Quality.* (a) The trial Court found that the hops substantially conformed to the quality provisions of the contract (G.R. 40). This finding is amply supported by the evidence (Appendix A, post, pp. vi-viii, xv-xx).

(b) Even if that were not enough, appellant would be precluded, upon other grounds, from urging a defense of alleged poor quality. Thus, as the trial Court found (G.R. 33, 36-37, 39), and as the evidence shows (Appendix A, post, iv-vi, x, xviii), the only claimed defect in the hops was the touch of mildew which appellant knew about when it contracted for the purchase and made the advance payment, and appellant did not in fact rely upon any representation or warranty that the hops would be any different than they were.

(2) *Form of relief.* On this issue appellant has a number of purely technical arguments. In essence, appellant contends that appellee should not be allowed to bring an action on the contract for the price, but should be relegated to an action for breach of the contract. The result of appellant's

theory as applied to this case would be that, even though appellant wrongfully refused to pay for its purchase, the appellee's measure of recovery would be zero. The trial Court concluded (G.R. 42) that under Oregon law the measure of appellee's recovery upon the facts was the balance of the contract price, after deducting the advance payment and the proceeds on resale.

Narrative Statement

All of the determinative facts appear in the Court's findings (G.R. 35-41, and Appendix A, post, pp. i et seq.), and we shall not here reiterate them. Instead, we shall fill in some of the background of the controversy which we believe to be inadequately or incorrectly described in appellant's statement of the case (Br. 3-10).

Practically all of the hops produced in the United States come from the Pacific Coast. Approximately 30% of the Coast production comes from Oregon, where the main source of supply is from the hop yards in the Willamette Valley. The chief use for hops is in producing beer.[5] A fraction of one per cent of the production is used in the drug and chemical trade. (G.R. 251, 446, 448-449.)

Hops are judged primarily on the basis of flavor, sometimes called aroma.[6] The flavor is given by the oils and resins in the hops, principally in the

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5 Mr. Schwind, the only brewmaster who appeared as a witness, testified that the hops here in controversy were good hops, such as he would have used in his brewery (G.R. 209-210, 214).

6 The hops in controversy had a good flavor (G.R. 212, 489).

lupulin.[7] (G.R. 82-83, 212, 248-249, 260, 458-459, 489; S.R. 330.)

Aside from hops controlled by grower-dealers, or by co-operatives, the usual course of trade is for the farmers to sell their hops to hop dealers who in turn resell to the brewers. The number of dealers to whom growers can sell has become limited in recent years. The three largest dealers are considered to be S. S. Steiner, Inc., appellant John I Haas, Inc., and appellant Hugo V. Loewi, Inc. (G.R. 252, 422, 447, 452, 475; S.R. 288; W.R. 383, 460.)

Nearly all of the hops so purchased by dealers from farmers are bought under a distinctive type of agreement, illustrated by the contracts involved in these cases. In many respects such contracts are *sui generis*. They have been found by the Oregon Court to create a relationship similar to a joint venture. The farmer provides the hop yard and his labor; the dealer advances money for the purpose of raising and harvesting the crop; and the farmer is bound to deliver the specific hops produced under the joint enterprise to the named dealer. Such a contract is not a mere option on the part of the purchaser, as appellant seems to assume, but is mutually obligatory. (G.R. 7-16, 452; S.R. 10-18; W. Ex. 1-A; *Livesley v. Johnston,* 45 Or. 30, 51-52, 76 Pac. 946, 951, 65 L.R.A. 783, 106 Am. St. Rep. 647; *Livesley v. Heise,* 45 Or. 148, 154, 76 Pac. 952,

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7 Lupulin: "[I]t is the yellow grain which you find inside." (G.R. 459.) "The resinous yellow powder found under the scales of the calyx of the hop." (Shorter Oxford English Dict.)

953; *Wigan v. La Follett,* 84 Or. 488, 497, 165 Pac. 579, 582.)

Hops are subject to certain vicissitudes. In some years there may be "mold," caused by aphis accumulating in the hops and giving them a dark color. In 1946 and 1948 the Yakima yards produced quite a few "red" hops caused by "wind-whip" (i.e., the arms of the vines sway in the wind, hit each other, and bruise the hops). In 1947 the Willamette Valley yards showed "red" hops caused by "mildew." Such mildew is brought on by rainy weather, and, depending on how late in the growing stage it develops, may stunt the vine so that no hops are produced; or it may stunt the cones so that they are just small nubbins, which like leaves and stems are extraneous matter in the baled hops; or it may merely color parts of the petals without affecting the lupulin. (G.R. 79-81, 145, 281, 369, 461; W.R. 92, 340, 469.)

In the first part of the 1947 hop-growing season it looked as if there would be a full crop of Oregon hops, and the dealers offered farmers contract prices of around 45 cents a pound. In the summer, however, the weather brought on unusual mildew in the Willamette Valley yards. The prospect was for a short crop, which always means high prices. The dealers then became anxious to buy more Oregon hops.[8] They rapidly increased the price offered to growers, and by September the growers' market

8 The Oregon purchases at that time were not competitive with Washington and California hops because the crops in those states were almost completely contracted (S.R. 310).

price had reached 85 cents a pound, with the following premiums and discounts:

> 5 cents a pound premium for fuggle hops, which mature earlier and are more resistant to mildew than cluster hops.
>
> 10 cents a pound premium for "seedless" hops (less than 3% seeds), or 5 cents a pound for "semi-seedless" hops (less than 6% seeds).
>
> 1 cent a pound premium for each 1% of leaf and stem content less than 8%.
>
> 1 cent a pound discount for each 1% of leaf and stem content greater than 8%.

(G.R. 94-95, 244-247, 343-344, 363, 369; G. Exs. 1, 29; S.R. 190-193, 240, 310-311; W.R. 255-256, 316-317, 340-341.)

Mr. Oppenheim, president of appellant, made an inspection trip out to Oregon in August, 1947. It is customary for hop dealers to examine the yards closely. Mr. Oppenheim made a comprehensive survey of the hop-producing section of the Willamette Valley. He was out here, he said, "when the downy mildew infestation was at its height." He found wide-spread mildew, "apparent to anybody with eyesight." He noted the prospects for a short crop and decided to buy more hops. (G.R. 189, 313, 426-427, 449, 453; S.R. 208, 245, 310-312; W.R. 340.)

Mr. Oppenheim was interested more in buying fuggles than clusters. About August 12, 1947, he and Mr. Paulus, appellant's local representative, watched Mr. Geschwill's fuggle crop being picked by machine at St. Benedict's Abbey (Mt. Angel College). At that time Mr. Paulus spoke to Mr. Geschwill about buy-

ing his fuggles. Mr. Geschwill was not interested in selling only the fuggles apart from the clusters. Subsequently Mr. Oppenheim authorized the purchase of both fuggles and clusters. The purchase of Mr. Geschwill's hops on that basis was negotiated for appellant by Mr. Fry. (G.R. 88-96, 323, 342, 450; S.R. 310-311.)

Mr. Fry was a field man and hop inspector from appellant's local office. Having been authorized to buy Mr. Geschwill's fuggles and clusters, Mr. Fry, on August 17, 1947, went out to see Mr. Geschwill at his hopyard. At that time Mr. Fry saw the cluster hops on the vine. The touch of mildew was then visible upon looking at the hops on the vine. Not finding Mr. Geschwill at the yard, Mr. Fry followed him into Mt. Angel, bargained with him for several hours, out-bid another buyer, had Mr. Paulus talk to Mr. Geschwill on the telephone, and then, to be sure the deal was closed, went to Mr. Geschwill's home that night to sign him up on the sales slip. The agreement was for a floor price of 85 cents, or the market price on a date selected by the grower, with the usual premiums and discounts. (G.R. 90-96, 152, 291-292, 312-313, 343.)

The following day, August 18th, Mr. Byers, another field man working under Mr. Paulus, went out to Mr. Geschwill's hop yard with the two contracts for him to sign, and paid him the $3,200 advance payment on the fuggles. Contrary to the usual practice, appellant had divided the transaction into

two papers, one for the fuggle hops and the other for the cluster hops. After Mr. Geschwill had signed them, Mr. Byers took the two contracts back to be signed by Mr. Oppenheim. Copies were returned to Mr. Geschwill by letter of August 27, 1947, together with an advance payment of $4,000 on the cluster hops. The cluster hops were picked within a few days, and duly cured,[9] baled and delivered in warehouse for the buyer in Mt. Angel.[10] (G.R. 97, 152-153, 341; G. Exs. 1, 2, 8, 29; S.R. 262; Appendix A, post, vi-ix.)

By September 17th Mr. Paulus' office in Oregon had forwarded to appellant in New York:

> Two "type" samples of the cluster hops—one by air express, the other by ordinary express (G. Exs. 11, 12).
>
> Advice that Mr. Geschwill had selected the going market price (G. Exs. 7, 9, 18).
>
> Results of the Government inspection—8% leaves and stems and 1% seeds (G. Exs. 5, 18, 40).

Appellant by telegram of September 18th to Mr. Paulus said concerning the Geschwill cluster hops (G. Ex. 20):

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9 Mr. Fry examined some of the hops after the drying and complimented Mr. Geschwill on the fine job he was doing (G.R. 159-161, 293).

10 Half of the fuggles and clusters were cured and baled by Mr. Geschwill and the other half by Mt. Angel College. Mr. Fry on trial, and counsel on brief, have asserted that the bales were "false-packed." This is a newly-coined term which, despite its bad sound seems to mean merely that, after appellant had decided to reject the cluster hops, Mr. Fry thought they did not run quite uniform. Mr. Paulus found that the alleged variation, which in any event must have been slight, was immaterial. Mr. Becker, an independent hop inspector, found that the bales did run uniform. (G.R.98-99, 119, 165, 183, 201-203, 223, 287-288, 336, 356, 360, 496-501.)

> "These hops fair quality but not prime delivery. At what price can you settle with grower?"

Thereafter three more type samples were sent appellant in New York (G.R. 352-353; G. Ex. 13), and Mr. Paulus advised appellant that Mr. Geschwill still wanted the going market price (G.R. 457). Appellant then, on September 25th,[11] telegraphed Mr. Paulus (G. Ex. 48):

> "Three samples Lot 79 Geschwill quality poor full of stems and blighted hops. Positively reject these hops. Don't settle with Geschwill on fuggles unless he returns advances on clusters. We instructed you not to take in any fuggle hops where clusters are involved until satisfactory settlements made. * * *"

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11 September 25th is the date upon which the other appellant, John I. Haas, Inc., also suddenly reversed its position (W. Ex. 5).

About that time it became known that the crop was not as short as the dealers had expected; and suggestions were then being made about Government grain restrictions which might reduce brewers' demand.

The U. S. Department of Agriculture Semi-Monthly "Hop Market Review" for September 29, 1947 (G. Ex. 33) has the following comments:

"This [favorable weather conditions] will tend to increase the Oregon crop somewhat above the trade estimate of around 60,000 bales shown in our report of September 15, but until all the hops are baled, the total production cannot be determined." (Actual Oregon 1947 production was over 80,000 bales, G.R. 245-247, 265, 453.)

"Suggestions that some restrictions be placed on the quantity of grains to be used during the year in the manufacture of liquors may have also been a factor in slowing down trading and movement of hops." (And see S.R. 323; W. Ex. 3-U.)

Concerning the timeliness of the "Hop Market Review," Mr. Walker testified (G.R. 255): "It is usually a little behind the market. If the market is either advancing or declining rapidly, they are probably fifteen days behind, but it probably took them that long to gather the news from the three states which they compile for the publication."

The conditions reported in the "Hop Market Review" for September 29th were undoubtedly known among the large dealers as early as September 25th, and especially the production under their own contracts.

At that time appellant had the official inspection report on the whole crop showing only 8% leaves and stems. Mr. Oppenheim had personal knowledge of the wide-spread mildew that year, and naturally the mildew which was general in the yards showed in the baled hops. Mr. Geschwill had a good crop,[12] and was able to have the hops picked by machine which operated to throw out mildewed hops. Mr. Oppenheim admitted that he found mildew in at least two or three out of every four samples of that year's Oregon crop, some "decidedly" worse than in the Geschwill hops. (G.R. 77-78, 142-143, 221, 238-239, 283, 414-415; G. Exs. 5, 40; W.R. 318, 465.)

Mr. Oppenheim admitted that the Geschwill fuggles definitely complied with the contract (G.R. 440). On September 24th Mr. Paulus had caused the fuggles to be inspected and weighed in and, as was customary, to be promptly paid for (G. Exs. 10-A, B, C). Mr. Oppenheim was wroth with Mr. Paulus for having so complied with the contract, as stated in appellant's letter of September 25th to Mr. Paulus

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12 There is ample evidence supporting the trial Court's finding: "Said hops upon tender and delivery as aforesaid substantially conformed to the quality provisions of said agreement." (Appendix, post, xvii, and vii, xv-xx.)

Appellant's only specific objection to the hops was the touch of mildew which, one of the buyer's expert witnesses admitted, did not affect the actual quality of the hops. (G.R. 481; and Appendix, post, x, xiv-xv.)

As a general practice hops with a touch of mildew such as these, and covered by a contract such as this, were in fact accepted by the hop dealers. (Appendix, post, xviii-xix.)

Appellant's brief (pp. 28-29) stresses the testimony of Mr. Hoerner who, at appellant's direction, made an unprecedented experiment with two minute samples of hops for the purpose of testifying. The experiment was not designed to, and did not, show the true extent of the mildew. (Appendix, post, xi-xii.)

(G. Ex. 27, and see G. Ex. 30):

> "Furthermore, we recently instructed you not to make any settlements with Growers who had combination Fuggles and Clusters, until we had both lots straightened out. Nevertheless, you wire us this morning that you took in the Geschwill Fuggles. We are perfectly satisfied to take this delivery, provided it does not jeopardize our standing on the Clusters, but as the contracts were made at one and the same time and work together, regardless of their being on separate pieces of paper, we want to handle the two lots as one. We therefore instructed you not to settle with Geschwill on the Fuggles until you have straightened out the Clusters unless he is willing to use the Cluster advances on the Fuggle delivery. We await your further report on this lot. * * *"

Of course, this interchange of correspondence between appellant and its local representative was unknown to Mr. Geschwill at that time. Appellant did not then notify Mr. Geschwill that it had decided to "positively reject" the clusters. Appellant had purported to base its decision on only a few samples in its New York office, and no inspection had been made of the full crop in the warehouse in Oregon. As Mr. Oppenheim explained on trial (S.R. 315):

> "* * * until they are actually examined bale for bale I would not consider a type sample as representative of the entire lot. That would be a very unfair position to take."

Mr. Haas, vice-president of the other appellant, also said (W.R. 462):

> "* * * you cannot inspect a lot by simply having one or two type samples * * *"

Accordingly, appellant decided to go through the "form" of a full inspection. As Mr. Oppenheim testified (G.R. 463-464):

> "Q. Did I understand you to say you did not think a lot of hops should be accepted or rejected until after a complete inspection had been made?
>
> A. That is simply the procedure of the trade. I believe we are required to inspect hops. We cannot just reject them and say, 'I won't take these hops.' We have got to go through the form, necessarily, the form of looking at the hops. We have to inspect the hops and know they are the hops tendered to us. I think that is a requirement or custom of the trade."

If the inspection was to be just a form, however, there was a problem about weighing the hops. The custom is that, when hops are inspected in the warehouse, the buyer's representative sets aside, and does not weigh in, any bales which are rejected. The weighing in of hops is considered in the trade as an acceptance of them.[13] As appellant advised Mr. Paulus on October 3rd (G. Ex. 47):

> "We confirm our wire to you today, referring to your letter of September 29th wherein you mention that when inspecting the various

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13 G.R. 116; W.R. 83, 126, 134, 137-138, 140-143, 194-195, 233; 325-328, 388, 411-414, 417-418, 421-438.

> lots which we have notified you are not prime, you were going to weigh these up if you could get some kind of an agreement with the Grower that it was o.k. to do so. However, we feel that until we have come to a final decision on these lots, they should not be weighed as weighing them would imply that we were considering accepting these hops at some price. We stated in our wire that we positively refuse to make any commitments of this kind."

Pursuant to his instructions (G. Exs. 17, 47), Mr. Paulus advised Mr. Geschwill on October 3rd (G. Ex. 4) that appellant thought the preliminary cluster samples to be below standard, and that his office had been instructed to "fully inspect" the hops and submit 10th bale samples to appellant's New York office for their final decision. Then appellant's local office prepared a form for Mr. Geschwill to sign (G. Ex. 32) reciting that the inspection and weighing would not be considered an acceptance. Mr. Fry had Mr. Geschwill sign the statement, as Mr. Geschwill testified (G.R. 163):

> "* * * he said it would be more convenient for him if they were weighed; all he has to do is write the weight down and I get my money, by doing it this way, and I said, 'If that is your way of doing it, it is all right with me.' "

On October 10th Mr. Fry went through the inspection for appellant.[14] The bales were already

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14 Mr. Fournier, the local bank manager, and Mr. Geschwill testified that during the inspection Mr. Fry made a complimentary remark to them, to the effect that the lot was one of the best he had taken in that year. (G.R. 110, 161, 195.) Mr. Fry denied this (G.R. 307-308).

stamped with the warehouse number and the Government inspection number. Mr. Fry lined up the bales, took tryings out of each bale, drew 10th bale samples, examined the tryings and samples, numbered each bale on the head, weighed the bales, and prepared the weight slips. (G.R. 109-111, 163, 315-317; G. Exs. 6-A, 6-B; Appendix, post, vi-vii, viii, x.)

No one with any authority to exercise any judgment as to either acceptance or rejection ever inspected the full crop. At the time the inspection was made appellant's local representatives had been instructed to reject the hops. (G.R. 464, 316-317, 351-352.)

After the 10th bale samples were received in New York appellant telegraphed Mr. Paulus (G. Ex. 26):

> "Received thirteen samples Lot 79 Geschwill crop. All samples show many blighted hops but samples of bales 70, 100 and 130 decidedly better than other samples. Willing accept any bales reasonably free of blighted hops and equal to these three samples. Reject balance account not being prime delivery."

Thereupon Mr. Paulus, Mr. Geschwill and Mr. Faulhaber examined the samples together, and they could not see any difference in those three bales as compared with the others.[15] Mr. Paulus found that all the samples showed the same general characteristics throughout. He found that while some part of the three samples might show a little more bright-

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15 Subsequently when the entire lot was examined for the purpose of the resale the hop inspector, Mr. Becker, found that the bales ran uniform to type sample (G.R. 287).

ness, the slight difference was not material. Mr. Geschwill thought that if those three were acceptable all of them were. (G.R. 118-119, 183, 201-203, 336, 360.)

Appellant did not choose to take all the hops that actually ran like those samples. Evidently appellant had in mind just taking enough to cover its advance, since Mr. Paulus had previously deviated from his instructions by paying for the fuggle hops in accordance with the contract without deducting the cluster advances (G. Ex. 27; G.R. 465). Accordingly on October 30th a letter of formal rejection of the whole crop was mailed to Mr. Geschwill (G. Ex. 3). On October 31st appellant recorded the contract as a chattel mortgage (G.R. 122; Appendix, post, vi.)

Appellant declined to come to any settlement with Mr. Geschwill (G. Exs. 41-45). Appellant declined to release the chattel mortgage unless Mr. Geschwill first paid $4,000.[16] (G.R. 468.) Resale of the hops with the chattel mortgage outstanding, and without the consent of appellant, was prohibited and probably would have constituted larceny by mortgagor (G.R. 122-124; §23-524, O.C.L.A.). The market

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16 Mr. Geschwill had expended far more money in the joint venture than appellant had (G.R. 73, 192).

was very limited.[17] Dealers ordinarily will not consider a lot of hops which are under contract to, or which have been rejected by, another dealer (G.R. 122-126, 188, 249-251, 461, 489; W.R. 134).

After having contracted with Mr. Geschwill to buy both fuggles and clusters, appellant took the fuggles, attempted to reject the clusters, and this lawsuit developed. After the action was commenced appellant on stipulation permitted resale of the clusters to Williams & Hart, the local firm of dealers whom appellant had originally out-bid to buy the hops. (G.R. 93-95, 122-130, 168-169; G. Exs. 27, 28; S.R. 310-311; Appendix, post, ii, xx-xxiii.)

Summary of Argument

Appellee's argument is directed to the two "ultimate issues" posed by appellant (Br. 4):

I. *Issue on quality of hops.* The trial Court found that the hops upon tender and delivery substantially conformed to the quality provisions of the contract, and that the appellee fully performed the contract. The findings are clearly supported by the evidence. (This is in answer to appellant's points I, II and III, Br. pp. 18-19, 20-46.)

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17 At first it was not a case of the *quoted* price declining so much as it was a case of very few purchases being made; later the market went down to 20 cents a pound. (Appendix, post, xxii-xxiii.)

As Mr. Walker explained on trial (G.R. 247):

"Of course, they [the dealers] wanted to retain that market, that level of the market, for the simple reason that most of the growers had open-end contracts at a selected date, at a high price for delivery, and the brokers, in turn, had made sales to breweries at the prices we had during that scare [i.e., short crop]. They naturally wanted to maintain that level, so the market stayed pretty high up until towards the close of the year, away up to the end of November, and then it leveled away and commenced going down; of course, as we know, it went down in 1948."

II. *Issue on form of action.* The trial Court concluded that upon the facts of this case, where the seller fully performed and made a valid tender of the goods, the seller can recover the balance due on the contract in this form of action. The trial Court's conclusion is clearly supported in law. (This is in answer to appellant's points IV, V, VI, VII, VIII and IX, Br. pp. 19-20, 46-71.)

I. ISSUE ON QUALITY OF THE HOPS

The trial Court found that the hops upon tender and delivery substantially conformed to the quality provisions of the contract. The finding is clearly supported by the evidence.

As to whether or not appellee complied with the contract, appellant's only contention is that appellee did not tender hops of contractual quality.

Appellant's only objection to the quality of the hops relates to the mildew (Appendix, post, vii-viii, x, xi). As Mr. Oppenheim, appellant's president, said (G.R. 438):

> "* * * if they had been entirely free of blight [i.e. mildew], they would—I would have said they would have been a good, prime hop; they were not as badly blighted or as red as some other hops which I had seen other samples of, Oregon hops."

The trial Court found that upon the facts the claimed defect was not material (Appendix, post x). Appellant argues that the claimed defect was substantial and that the hops therefor did not conform to the quality provisions of the contract.

The Court found: "Said hops upon tender and delivery as aforesaid substantially conformed to the quality provisions of said agreement." (G.R. 40; and see Appendix, post, vi-viii, x, xv-xx.)

There is substantial evidence in the testimony of qualified witnesses to support that finding. (E.g., Mr. Geschwill, G.R. 134-135, 173 et seq.; Mr. Sprauer, G.R. 223-224; Mr. Faulhaber, G.R. 202.)

While the judgment is also justified on other grounds, we submit that the quoted finding and supporting evidence are alone sufficient to sustain the trial Court's determination on this factual issue.

Appellant's contentions. Leaving aside for the moment the question of whether or not appellant can now assert the warranty, not having relied upon it, both parties agree that the contract provided for "prime quality" hops. As we have seen, there is substantial evidence that these hops were of that quality. Appellant seems to contend, however, that the testimony of the hop men who so testified should be rejected, for two reasons: (a) It is opposed by some of the testimony of appellant's witnesses; and, (b) it is said to be contrary to counsel's interpretation of some of the phrases used in the contract.

Conflicting evidence and credibility of witnesses. Appellant's first contention involves the determination of the factual issue on conflicting testimony, and an inquiry as to the credibility of witnesses. In effect appellant asks this Court to re-try the case

on the voluminous paper record. In this connection we rely upon the trial Court's findings and the evidence which clearly supports them (Appendix, post, particularly vi-viii, x, xx); Rule 52(a), Federal Rules of Civil Procedure,[17a] and the Oregon law developed in similar hop cases, such as *Seidenberg v. Tautfest,* 155 Or. 420, 426, 64 P. 2d 534, 536, where it is said:

> "The reason plaintiff [hop buyer] really asserts for the rejection of the hops is that they do not conform to the quality specified in the contracts. This question presented an issue of fact. It would require many pages of the reports to set forth the testimony of the various hop experts relative to this phase of the case. The record discloses that judging the quality of hops is not an exact science. Some of the experts on behalf of plaintiff [hop buyer] testified that a certain sample of hops was of 'prime quality' whereas on the following day the same expert declared the identical sample 'not prime'. Many experienced growers of hops testified, in effect, that the hops met the standard of quality provided in the contracts. The trial judge, who saw and heard the witnesses testify, found with the grower on the question of quality. After an examination of the record, we have no hesitancy in concurring in such findings."

Meaning of trade terms used in the contract. Appellant's other principal contention seems to be (Br. 22) "that the expression 'prime quality' means

[17a] "* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"

exactly what the rest of the warranty specifies," plus an additional item, freedom from mildew, not mentioned in the contract. Appellant then assumes that the terms used have meanings quite different from what in fact the parties understood.

The contract uses several phrases to describe "prime quality." To be "prime" it is said that hops must be "cleanly picked," "good color," etc. But each of those phrases in turn requires definition. For example, "cleanly picked" does not require a total absence of leaves and stems. The contract here itself permits 8% to 10% leaves and stems (G.R. 9); these hops had 8% (G. Ex. 5); an 8% pick was the average considered "prime quality" in 1947 in the Willamette Valley without deduction from the base price (W.R. 197-198, 241, 343, 345); and in fact hops having 13% pick were taken under "prime quality" contracts in Oregon that year (W.R. 241; post, xix). Again, in the trade "good color" means "bright color," whether the color be greenish, yellowish or a combination of the two (G.R. 264, 397).

As applied to these particular hops, appellant's witness Mr. Ray testified (G.R. 481):

> "* * * I assume from the appearance—however, they are more than a year old—that the quality was not damaged by mildew. It appeared to be a good-colored hop, reasonably well picked."

As a matter of fact, the description in the contract of what constitutes a "prime quality" hop might

not even suggest to a layman what it means to a hop grower or dealer. Thus, Mr. Ray described his procedure in examining hops to determine whether or not they were of "prime quality" as follows (G.R. 397):

> "We examine the hops, the visual appearance of the hops; we rub some of the hops up to get an aroma; we feel of the samples to get the feel of the texture of the hop; and in our visual examination we take into consideration the condition and appearance of the lupulin, whether it is in proper condition, whether it has been injured, and also whether or not the hop is cleanly picked and that the color is even, bright, and not blemished with imperfections."

The principal test is for flavor or aroma (G.R. 212, 429, 458, 489). Mr. Ray judged that these hops "had a good flavor" (G.R. 489). Mr. Schwind, the brewmaster who examined samples of these hops when they were fresh, agreed that they had a good flavor. He said (G.R. 212):

> "I took some of the sample and rubbed it and smelled it and saw that is what I wanted."

There is substantial evidence that these hops were of "prime quality"[18] and met each of the descriptive phrases in the quality provisions of the contract to which appellant refers (Br. 20, 22).[19] Appellant's

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18 Evidence that the hops were of "prime quality," see Appendix, post, vii-viii, xv-xx.

19 The hops were not the product of the first year's planting (G.R. 134, 358), not affected by spraying or mold (G.R. 172, 358), in sound condition (G.R. 134, 172, 358), good color (G.R. 134, 179, 481), fully matured (G.R. 134, 179-180), cleanly picked (G.R. 134, 180, 204), free from damage by vermin (G.R. 358, 435), properly dried, cured and baled (post, iii), and in good order and condition (G.R. 135, 181)).

only specific objection to the hops was that they showed some evidence of mildew; mildew is not mentioned in the quality provisions of the contract; and the evidence is that the touch of mildew did not prevent these hops from being "prime quality".[20]

Interpretation to be given trade terms in contract. Now the question is whether appellant can properly ask the Court to ascribe some meaning to the contractual language different from the meaning such language had to the parties who used it. It is clear in such a case under Oregon law, as well as general law, the trade usage must control. Such is the Oregon statutory rule:

> "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret." §2-218, O.C.L.A.[21]
>
> "The terms of a writing are presumed to have been used in their primary and general acceptation, but evidence is nevertheless admissible that they have a technical, local, or otherwise peculiar signification, and were so used and understood in the particular instance, in which

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20 The only specific objection made by appellant referred to the mildew, and the slight touch of it did not prevent the hops from being "prime," see Appendix, post, iv-v, x-xi, xiv-xv.

21 The provisions of this section are made a specific exception to the statutory parol evidence rule, §2-214, O.C.L.A.: "* * * But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in section 2-218, or to explain an ambiguity, intrinsic or extrinsic, or to establish illegality or fraud. * * *"

> case the agreement shall be construed accordingly." §2-219, O.C.L.A.

It is, of course, the rule followed by the Oregon Court. Thus, in an exhaustive decision, reconciling prior cases, the Court said:

> "[W]e state our conclusion that members of a trade or business group who have employed in their contracts trade terms are entitled to prove that fact in their litigation, and show the meaning of those terms to assist the court in the interpretation of their language." *Hurst v. Lake & Co., Inc.*, 141 Or. 306, 317, 16 P. 2d 627, 631.

The principle was recently again emphasized in *Dorsey v. Oregon Motor Stages,* 183 Or. 494, 504-506, 194 P. 2d 967, 971-972.

Such is also the generally-accepted rule: Restatement of Contracts, §246 and Illustration 7, §248 and Illustration 5; Williston on Contracts, Rev. Ed. §650; Wigmore on Evidence, 3d Ed., §2460; Anson on Contracts (Corbin's Ed., 1919) §351.

It is also the rule applied by the Oregon Court in similar hop cases. For example, in *Wigan v. La Follett,* 84 Or. 488, 165 Pac. 579, the hop buyer introduced evidence that the hops were "dirty picked" and "moldy, 'not a sprinkling of mold, but moldy,' " and it was admitted that the hops contained some which were the product of the first year's planting. The jury found, in effect, that "prime" hops need not be perfect, and that the hops were "prime". In sustaining the judgment the Supreme Court approved the following instruction (84 Or. 502-503):

"* * * You are to accept the definition of prime quality as laid down in this contract by the parties themselves. You are, however, to consider these terms as used in this contract in the ordinary meaning and acceptation of those terms. *You are to give them such a reasonable construction and meaning as are placed upon them by persons who are engaged in the hop business.*" (Italics ours.)

Appellant's "definite" standard. Appellant's real difficulty here is that it is attempting to obtain "choice" hops or better, for the price of "prime" hops. Appellant says (Br. 22) that there is a never-varying "definite standard" for "prime quality" hops, and then appellant (Br. 23-24) seeks to show what that standard is from cases involving "choice" hop contracts.[22]

Formerly hops were bought from growers on the basis of several grades, and "prime" was an average grade. Thus, in *Lachmund v. Lope Sing,* 54 Or. 106, 109-110, 102 Pac. 598, 599 (1909), it is said:

"There is evidence offered by the plaintiffs [assignees of hop buyers] tending to show that some portions of the hop field were affected with mold, and that portions of the baled hops, after the harvesting was completed, also contained considerable mold. Hop dealers were

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22 The two cases principally relied upon by appellant (Br. 23-24) are *Netter v. Edmunson,* 71 Or. 604, 143 Pac. 636, which involved a "first quality" or "choice" contract, and *Lilienthal v. McCormick,* 86 Fed. 100, which involved a pleading problem relating to a "choice" hop contract.

Actually the precursor of the present "prime quality" contract would seem to be the former contracts which called for hops "of the first average quality for the year and section," such as was involved in *Catlin v. Jones,* 48 Or. 158, 159, 85 Pac. 515.

> called as witnesses, and testified that hops are graded, according to quality, as medium, medium to prime, prime, prime to choice, and choice, and that contract hops, as defined in the contract, calls for choice hops. Most of the plaintiffs' witnesses testified that defendants' [growers'] hops graded medium to prime—three grades below choice—and one witness testified that they were two grades below choice [i.e., prime]."

That system of grading no longer prevails; now grower-dealer hop contracts call for just "prime quality" (G.R. 283-284, 357, 452, 486). While the great bulk of the hop crop moves under such "prime quality" contracts,[23] appellant says in effect that only the very "top grade" of hops can meet the standard for the sole grade.

The situation here is much like that in *Daniels v. Morris,* 65 Or. 289, 294-295, 130 Pac. 397, 399, 132 Pac. 958. In that case the Oregon Court, experienced in hop litigation, said:

> "The contract calls for hops of prime quality, even color, cleanly picked, and not broken. Plaintiff Daniels [the hop buyer] and other witnesses called by plaintiffs, in describing or defining hops of prime quality, say it is a hop that is cured properly, picked cleanly, dried enough so as to keep, and not overdried. They describe choice hops in practically the same

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23 Mr. Oppenheim testified with respect to Pacific Coast hops in 1947 (G.R. 452): "I would say that possibly 90 to 95 per cent were either under contract or controlled by grower-dealers or dealers who grow hops of their own, or by the Co-op up in Yakima. * * * As far as I know, all contracts are written as prime quality."

> terms, and, in distinguishing between prime hops and choice, they were not able to name any differential feature; but we understand from their efforts to describe them that choice hops are hops a little cleaner picked, a little better dried, without being too much dried, and of a little better color than prime hops. In other words, it depends upon the opinion of the person judging, rather than on any accurately definable conditions. If hops are fairly well dried, fairly cleanly picked, and of good color, one expert can consistently pronounce them prime, while another may pronounce them less than prime; and so also as to choice hops. Opinions differ. If a buyer is under contract to buy prime hops and wishes to avoid his contract, it is not difficult to claim the hops as less than prime and to get his friends to agree with him."

In this case appellant's "friends" who pronounced the hops less than prime were Mr. Oppenheim, appellant's president, Mr. Ray, local representative of the other appellant, and Mr. Franklin, who admittedly "didn't see a Willamette Valley hop in 1947" (G.R. 495). They spoke only from samples, not having seen the crop on the vines or in the bales; they restricted their objection to the hops to the sole ground of mildew; and there is some reason for questioning the judgment of each of them. (See Appendix, post, xiii-xv, xviii-xx, xxii-xxiii.)

Mr. Ray admitted that his opinion of "prime quality" did not coincide with the trade practice.

It was his opinion, for example, that hops to be "prime" should be picked 6% or cleaner (W.R. 184, 241). But he admitted that in the trade 8% picking was the general standard for the application of the market-price scale, and in fact hops with 13% leaves and stems were taken under "prime quality" contracts that year (W.R. 179, 184, 241, 251, 255-256). Some of Mr. Ray's own hops that year were mildewed, showed 12% pick, were taken by the hop buyer, and were resold to brewers (W.R. 456-457; W. Ex. 17).

It is the opinion of selected witnesses such as Mr. Ray, whose views confessedly deviate from established trade practice, that appellant's counsel wish to set up as their "definite standard" (Br. 22).

On the other hand, Mr. Oppenheim, appellant's president, testified that hop men differ in their opinions "plenty of times" (G.R. 456). He testified that there is "no fixed standard" for a "prime" hop (S.R. 309-310):

> "Q. Do you sell your hops to brewers as prime hops?
>
> A. Well, we call them prime hops, or we often call them choice hops, too. A choice hop, as I have always understood, to a brewer is the same as a prime hop on the Pacific Coast, because there is no fixed standard, no Government standard. We are an old-time house, and that was customary when I was a boy and got into the business. Our concern always called them choice. Other people call them prime. It is just a matter of custom. * * *

> Q. There are no fixed standards for these terms?
>
> A. No, sir."

The lack of a definite standard was also confirmed by Mr. Haas, vice-president of the other appellant (W.R. 457-459).

In appellant's brief (p. 25) it is asserted by counsel that the buyers "are either obligated to deliver to brewers hops of top quality, or would be unable to sell hops of any other grade than top quality." It is suggested, however, that Mr. Oppenheim's testimony is more candid (S.R. 308):

> "We are not specialists in any better than ordinary hops. We are handling the same hops as the other people do."

These were good, merchantable hops, such as were actually accepted in the trade as prime quality. As we have seen, hops are bought by the hop dealers for resale to brewers; all grower-dealer contracts specify prime quality; and it is difficult to say exactly what prime quality is. In view of those facts, appellee introduced evidence on trial to corroborate the testimony that these hops were prime quality by showing that they were good, merchantable hops, equal to the average actually accepted in the trade that year under prime quality contracts. On brief appellant vigorously protests the relevancy of such evidence.

Merchantability. The trial Court found (Appendix, post, x):

> "Said hops when tendered were merchantable."

The finding is supported by substantial evidence (Appendix, post, xv-xvii).

This Court has previously held (*Wolf v. Edmunson,* 240 Fed. 53, 59) that in such a case as this the "merchantable quality of the hops according to the custom of the hop trade" is the "real question of fact" for determination. The Court there approved Judge Wolverton's instruction:

> "I will state further, in this connection, gentlemen of the jury, that these hops were raised for the market, and the contract was made with the market value in view, and, in considering the quality of these hops, you will consider them as merchantable, as the parties themselves desired that the hops should be sold in the market and should be so treated, so that the merchantable value is the thing you are to consider, and not, strictly speaking, the real inherent or chemical value."

Appellant's counsel, however, believe (Br. 34) that "the finding of merchantability is wholly immaterial as it does not determine any issue in this case."

The fact is that it determines an issue raised by appellant's counsel themselves. The underlying theme throughout appellant's argument is that the hop dealer should not be required to pay for the hops because it could not, it is asserted, have resold

them. The evidence and finding that the hops were merchantable (i.e., "fit for sale," "of a quality such as will bring the ordinary market price"—Black's Law Dict., 3d Ed.) directly disposes of that issue.

Appellant on brief (pp. 26-27) states: "No brewer would purchase his requirements without a guarantee of quality, and it is equally true that no buyer would undertake to meet the guarantee without protection in his contract with growers." However, Mr. Oppenheim's testimony is (G.R. 452):

> "Q. Do those contracts [to brewers] contain the same definition which you insert in your growers' contracts?
>
> A. No, I said we simply sell hops as good hops. We don't sell them on any written specifications of cleanly picked hops, properly cured, and so forth. We don't have in our contracts in recent years the usual 8-per cent or 6-per cent picking clause. * * *
>
> Q. You do not have, in your brewers' contracts, this language which appears in the growers' contracts?
>
> A. No, sir."

Mr. Schwind, the only brewmaster called as a witness, testified that, if his brewery had not already been fully supplied, he would have liked to buy the Geschwill hops (G.R. 214). Mr. Schwind said (G.R. 209-210):

> "A. The hops appeared as if they were a good hop.

Q. Would you say they were prime quality hops in the hop trade?

A. When we buy from a grower or dealer, I look for good hops. He can call them what he wants to, prime, or choice, or standard. I think I should know a good hop from a poor hop.

Q. In your opinion, were these good hops?

A. Was good, average hops."

In this connection it should be remembered that the contract price for these hops was the market price on the selected date. The contract provided (G.R. 8-9):

> "The price to be paid for the hops to be delivered shall be the Grower's market price for the kind and quality of hops delivered * * *"

The evidence is clear that these hops were of the quality which brought the ordinary market price (Appendix, post, xv-xix).

The buyer dealt in good merchantable hops, and the grower in fact tendered such hops. The quality of the hops tendered was such that they were acceptable to brewers.[24] If appellant miscalculated the

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24 Such hops were readily taken by the breweries. As Mr. Willig, manager of the Oregon Hop Producers Cooperative, said with reference to Mr. Wellman's hops which also showed a touch of mildew (W.R. 152-153):

"Q. Would you say from your experience in selling hops over the years that hops of the same general character and quality of these had been accepted under this type of contract?

A. Yes, they had.

Q. In 1947 to whom did you sell your hops?

A. Directly to the breweries.

Q. Did you sell hops to breweries of the same general kind and quality as you have seen here in the courtroom?

A. That is about all we had to sell that year in the form of late hops.

Q. Did they accept them and make beer out of them?

A. That is right."

supply and the market, and contracted to buy larger quantities than it could profitably resell, that provides no basis for rejecting these hops.[25]

These were such hops as were actually accepted in the trade as prime quality. The trial Court found (G.R. 39-40):

> "Said hops were of substantially the average quality of such Oregon cluster hops actually accepted in 1947 by the hop trade generally and by defendant under contracts containing the same type of quality provisions."

The evidence is that the great part of the 83,000 bales of Oregon hops in 1947 moved in the trade under "prime quality" contracts, and that nearly all the crops showed evidence of mildew (G.R. 250-251, 269, 394). It seems self-evident that the hops with a touch of mildew such as these were in fact accepted in the trade as "prime."

Appellant's counsel (Br. 28, 30) have severely criticized the hop men who spoke of the sole grade of hops ("prime quality") as being "average" or "good average," and whose opinions of "prime quality" did not coincide with counsel's. However, even appellant's witnesses found difficulty in formulating a verbal definition of "prime quality." Mr. Oppenheim said (G.R. 458) that judging a hop comes from experience, "It is hard to write it down in

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25 The case is analogous to *Prestige, Inc. v. Schwartzberg, Inc.* (La. App.) 38 So. 2d 169, where the buyer attempted to cancel its order for silk hose on the ground that it was of poor quality, but in fact the hose was as good as or better than comparable products, and the real reason for the attempted cancellation was that the market for silk hose had become limited, it was held that the seller was entitled to recover.

books." Mr. Ray said (G.R. 395) that a definition of "prime quality" is "impossible to put entirely in words."

Accordingly, it seemed relevant to show that as a matter of actual practice such hops as these were accepted in the trade generally as "prime quality." Appellant sought vigorously to prevent appellee from obtaining and from introducing evidence of such actual practices, even though it concerned issues raised by appellant (e.g., W.R. 123-124, 438-441; S.R. 255, 258-259; G.R. 87, 103-104, 106). Nevertheless, the record abundantly supports the finding (Appendix, post, xix).

On brief (p. 31) appellant's objection to this evidence is primarily that it relates to collateral transactions not binding on the parties. But the practices of the trade as to the meaning of a trade term certainly have probative value, just as the practices of the parties under a private contract have as to the meaning of that instrument. "Tell me," said Lord Chancellor Sugden, "what you have done under such a deed, and I will tell you what that deed means." (*Attorney General v. Drummond,* 1 Dr. & War. 353, 368, aff'd 2 H. L. Cas. 837; quoted and applied in *Burton v. O.-W. R. & N. Co.,* 148 Or. 648, 656, 38 P. 2d 72.) It seems equally pertinent to show the Court what the trade has done under a standard form of contract in order that the Court may say what the trade interpretation of that contract is.

"Assumption of risk." Appellant purports to demand only the letter of its contract, and to insist

that each party take the risk which he has assumed. Appellant then argues (Br. 26) that all risk of loss must rest upon the grower:

> "It is true that growers do not have complete control over the quality of hops produced by them, but they have elected to engage in the business of growing hops and from time immemorial farmers and growers of all products have had to assume the risk of poor crops."

Which is to say that, while appellant profits on rising markets, it wishes retroactively to shift to appellee the risk of falling markets on resales.

The evidence is that Mr. Geschwill had a good crop. Even assuming appellant's premise of a "poor crop," however, the argument about the grower's "assumption of risk" is not valid because appellant elected to require appellee to harvest and deliver his crop. The uncontested finding of the trial Court is (G.R. 37; Appendix, post, vi):

> "6. Said agreement provided in substance that if said growing crop at or before the time of picking was not in such condition so as to produce the quality of hops called for under the terms of the agreement then the defendant buyer would be discharged from any obligation to make said advance. Before and at the time of picking defendant knew that there was mildew in plaintiff's said crop of cluster hops and that said crop when picked and baled would in normal course show such mildew. Defendant elected to and did make plaintiff said advance. Said mildew in said crop did not thereafter become more pronounced or prevalent."

Thus, if the crop was not satisfactory to the buyer, it was not bound to make the harvesting advance. But when the advance was made, the grower was thereby bound to harvest and deliver the crop. The grower could not compain that the buyer wanted the hops with the touch of mildew. The grower naturally relied upon the buyer's election when, with full knowledge of the condition of the crop, the buyer made the advance and required performance by the grower. The buyer should not now be heard to say that it had a secret reservation concerning the mildew then known to exist.[26] As Professor Williston says:

> "The principle is general that wherever a contract not already fully performed on either side is continued in spite of a known excuse, the defense thereupon is lost and the injured party is himself liable if he subsequently fails to perform, unless the right to retain the excuse is not only asserted but assented to."

Williston on Sales, Rev. Ed., §191c; Williston on Contracts, Rev. Ed., §688; applied in *Sheehan v. McKinstry,* 105 Or. 473, 483, 210 Pac. 167; accord, Restatement of Contracts, §309.

Appellant's other factual contentions. In addition to the matters considered above, appellant has also raised some subsidiary factual issues. These in-

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26 As the Oregon Court said of such a clause in the hop contract in *Livesley v. Johnston,* 45 Or. 30, 48, 76 Pac. 13, 946, 65 L.R.A. 783, 106 Am. St. Rep. 647: "It was not left to the mere option of Livesley & Co. [the buyer] to advance such funds as and when they saw fit, but they or their agent must pass an honest judgment as to whether or not the crop is in the proper condition; that is, for the production of such hops as is bargained for."

clude: The amount of mildew and Mr. Hoerner's unprecedented experiment (Applt's Br., 28-29, 37; Appendix, post, xi-xii); "selective picking" (Applt's Br., 11; Appendix, post, iii-iv); all of the hops were substantially like that part of them which appellant found acceptable (Applt's Br., 15, 34-35; Appendix, post, xix-xx); the restricted market for resale (Applt's Br., 15, 36-37; Appendix, post, xxii-xxiii); appellant's actual reason for rejecting the hops (Applt's Br. 36; Appendix, post, xiii-xiv). Some of the evidence on these matters has been stated above in the narrative statement of the facts. In addition, the Appendix hereto contains citations to the evidence supporting each of the trial Court's findings which appellant contests.

Tender. As noted above, appellant's sole objection to appellee's tender was and is on the ground of quality. Under the Oregon statute appellant could not now attempt to claim any other ground for the purported rejection. §72-103, O.C.L.A.;[27] *Seidenberg v. Tautfest,* 155 Or. 420, 424, 64 P. 2d 534.[28]

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27 "The person to whom a tender is made shall at the time specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards."

28 "Regardless of what may be the rule in other jurisdictions, it was incumbent upon the plaintiff [buyer], under the statute of this state, to specify its objections to the hops at the time delivery was tendered. * * * Having objected solely to the quality of the hops at time delivery was tendered, it will not do for the buyer at this time to mend his hold and undertake to justify rejection of the hops on the ground that the grower failed to produce the amount specified in the contract."

Appellant's authorities. Appellant cites (Br., 40-45) a number of cases for the general proposition that, assuming the hops did not conform to the contract:

> "A buyer has a right to performance of the contract of sale in accordance with its terms, and it is no excuse to the seller that some other performance should be just as satisfactory or serviceable."

Of course, the converse is equally true—since, as the Court found, the hops did substantially conform to the contract, appellant was not justified in attempting to reject them.

It should also be noted that the decisions cited by appellant do not involve the same type of factual situation as this case. Here the contract was not for the sale of hops which appellee could have bought on the market for resale. This contract required the appellee to deliver the entire, specified crop from the designated premises (G.R. 7-8; Appendix, post, i-iii). The contract related to specific goods. As Judge Wolverton said of the hop contract in *Livesley v. Johnston,* 45 Or. 30, 52, 76 Pac. 13, 946, 65 L.R.A. 783, 106 Am. St. Rep. 647:

> "* * * the contract has reference to the specific property to be produced under its terms * * *"

The Sales Act (§71-176, O.C.L.A.) defines the term "specific goods" to mean "goods identified and agreed upon at the time a contract to sell or a sale is made." Under such contracts as these the goods are "specific". *Pittenger Equipment Co. v. Timber*

Structures, Inc., 50 Or. Adv. Sh. 625, 635, 217 P. 2d 770, 775.

This distinction becomes particularly important in considering appellant's legal arguments below.

Appellant cannot claim a "warranty" that the hops would be any different than in fact they were. Appellant at the time of making the contract for the purchase of the specific hop crop, and also at the time of making the harvesting advance, knew that the crop showed a touch of mildew (Appendix, post, iv-vi). Now appellant says there was an express "warranty" that the hops would be of prime quality, and argues that "prime quality" means totally free of mildew. We have seen that there is substantial evidence the hops were prime quality. But even if that were not true, they were good merchantable hops and appellant could not now assert any such claimed warranty that they would be free of the mildew which appellant knew existed. Appellant cannot claim any such "warranty" for two reasons: (1) appellant did not rely thereon; and, (2) appellant induced appellee to understand that it would not rely thereon. As the trial Court said in his memorandum of decision (G.R. 33):

> "* * * In the Geschwill case the contract was made after the hops were known to be mildewed. * * * Under these circumstances, the buyer cannot now reject the hops on the ground that the hops do not comply with the contract. This would be abhorrent to equity."

Appellant cannot assert a claimed warranty upon which it did not rely. The Sales Act (§71-112, O.C.L.A.) defines an express warranty as follows:[29]

> "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, *and if the buyer purchases the goods relying thereon.* * * *" (Italics supplied.)

Having contracted to buy the hops knowing of the mildew, appellant did not rely upon, and cannot assert, any claimed warranty to the contrary. *Tomita v. Johnson,* 49 Idaho 643, 290 Pac. 395; *Kraig v. Benjamin,* 111 Conn. 297, 149 Atl. 687.

The Sales Act embodies the common-law principle. As Judge R. S. Bean said (*Abilene Nat. Bank v. Nodine,* 26 Or. 53, 54, 37 Pac. 47):

> "To constitute an express warranty, such as is attempted to be alleged in the answer, there must be, as part of the contract of sale, either an express undertaking to that effect, or some affirmation or representation as to the quality or condition of the thing sold, made at the time of the sale, for the purpose of inducing the buyer to make the contract, *and in either case the buyer must have relied upon the agreement or representation in making the purchase.* It is elementary law that unless the purchaser of personal property relied and acted upon the

29 The same principle applies to implied warranties. §71-115(3), O.C.L.A., provides: "If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed."

statement or representation of the seller as to the quality or condition of the thing sold, and was thereby induced to make the purchase, he cannot maintain an action for a breach of warranty; and hence it is sometimes held that a general warranty does not apply to obvious defects known to the purchaser, because, *in the very nature of things, one cannot rely upon the truth of that which he knows to be untrue.* It is therefore essential in an action for a breach of warranty for the purchaser to allege that he relied upon the warranty and was thereby deceived: [citations]." (Italics ours.)

On principle this case is similar to *Gonter v. Klaber*, 67 Wash. 84, 120 Pac. 533. There the plaintiff grower sold his entire hop crop to the defendant dealer, who had received samples and examined a part of the hops prior to the time the contract was entered into. After the contract was signed the price of hops declined, and the buyer made a perfunctory inspection and rejected the hops. The grower resold the crop and sued for the difference between the contract and the resale price. The trial Court found that the quality of the entire crop corresponded to that of the part examined prior to the purchase, and gave judgment for plaintiff. On appeal the judgment was affirmed, the Court saying:

"It is true, an inspection was made and a part of the hops, viz., eighteen bales thereof, were conceded to equal the samples. It is conceded also that the price of hops had declined materially at the time they were inspected. There is some dispute as to whether the inspector re-

> jected hops at the time of the inspection, but it was shown, we think conclusively, that the one hundred bales were all as good as, or better than the eighteen bales which were conceded to be sufficient. We are satisfied, also, that the inspection made was an arbitrary one, for the purpose of avoiding the obligation rather than of determining the quality of the hops, and there is ample evidence to support the finding quoted above that all of the hops were of the same quality and grade as the eighteen bales mentioned."

So here the buyer knew of the mildew when it entered into the contract, and upon the "form" inspection the same touch of mildew was found. The buyer was tendered the identical hops for which it had bargained.

The same principle is illustrated by other cases:

Thus, in *Worthington v. Gwin,* 119 Ala. 44, 24 So. 739, 43 L.R.A. 382, the contract provided that the ore produced should be "free of foreign substance." The court found that the manifest intention of the parties was that the ore should be free of foreign substance "other than such as was contained in the vein of ore." It was held that the pretext of dissatisfaction with some of the ore (actually based upon dissatisfaction with the price) was not sufficient excuse to permit the buyer to repudiate the contract.

In *Standard Cotton-Seed Oil Co. v. Excelsior Refining Co.,* 47 La. Ann. 781, 17 So. 303, 49 Am. St. Rep. 386, the contract called for "prime crude

cotton-seed oil". At the time the contract was entered into, late in the season, there could only be produced "prime crude cotton-seed oil of the season". The court held that the article with respect to which the parties were contracting "was necessarily the kind of article which could be manufactured at that late time by the seller".

Even assuming appellant's argument that the hops were inferior for 1947, which argument is not supported by the evidence, the situation here would be similar to that in *Paul v. Salisian,* 87 Cal. App. 721, 262 Pac. 779, in which the court characterized the buyer's appeal as "entirely without merit" where "appellant bargained for the purchase of the raisins after he had fully inspected them and found some to be wet and of inferior grade" and where "after the delivery he discovered that he had made a poor bargain and gave written notice of rescission on the ground of breach of warranty of quality."

Compare also *Loose v. Flickinger,* 121 Cal. App. 77, 8 P 2d 517; *Kenney v. Grogan,* 17 Cal. App. 527, 120 Pac. 433.

Appellant cannot claim a "warranty" which it induced appellee to understand it would not rely on. The point here is another facet of the principle discussed above, pp. 35-37, i.e., when the buyer made the contract, and subsequently the harvesting advance, with knowledge of the mildew, the grower was naturally led to believe that the buyer would not subsequently claim any asserted defect of qual-

ity because of the mildew. Such a defense is contrary to the basic dictates of good faith and fair dealing, as stated by this Court in *Lilienthal v. Cartwright,* 173 Fed. 580, 584:

> "* * * plaintiffs [hop buyers] are now asserting a claim which they or their agent induced the defendant [hop grower] to believe they would not rely on, and upon the faith of which defendant placed himself in a position where he could not carry out his contracts. * * * In Dickerson v. Colgrove, 100 U.S. 578 [581], 25 L. Ed. 618, the Supreme Court of the United States refers to the case of Faxton v. Faxon, 28 Mich. 159 [161], as an authority upon this subject. * * * 'There is no rule more necessary to enforce good faith than that which compels a person to abstain from asserting claims which he has induced others to suppose he would not rely on. The rule does not rest on the assumption that he has obtained any personal gain or advantage, but on the fact that he has induced others to act in such a manner that they will be seriously prejudiced if he is allowed to fail in carrying out what he has encouraged them to expect.' "

And see *Marshall v. Wilson,* 175 Or. 506, 518, 154 P. 2d 547; *Fried v. Fisher,* 328 Pa. 497, 196 Atl. 39. And see also *Heid Bros. v. Carver,* 94 Colo. 54, 27 P. 2d 756, in which it is said that any other view of the matter "would stultify both parties as well as the court."

II. ISSUE ON FORM OF ACTION

Appellee, having fully performed the contract and having made a valid tender of the hops, can maintain his action to recover the balance due on the contract.

Appellant's first main point, considered above, related to the factual issue about the condition of the hops. Appellant's other main point, to be considered below, is the contention that appellee has mistaken his remedy and can have no relief, because of the application of (A) some provisions of the Uniform Sales Act, and (B) selected provisions of the contract. On this main issue the District Court concluded (G.R. 41-42), and appellee here contends, that upon the facts of this case where the seller fully performed and made a valid tender of the goods, the seller can recover the balance due on the contract.[30]

The Oregon Court has specified the remedies of the unpaid hop grower as follows (*Daniels v. Morris,* 65 Or. 289, 298-299, 130 Pac. 397, 132 Pac. 958):

> "When a buyer refuses to take and pay for property offered by the seller in performance of an executory contract for the sale thereof, the latter has the choice of either of two remedies. He may keep the property on hand subject

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30 Both before and after the adoption of the Uniform Sales Act the Oregon Court approved the following statement of the law:

"As held in *Dustan v. McAndrew,* 44 N.Y. 72, upon the failure of a purchaser to perform a contract for the sale of personal property, the vendor, as a general rule, has the election of three remedies: (1) To hold the property for the purchaser, and to recover of him the entire purchase price; (2) to sell it, after notice to the purchaser, as his agent for that purpose, and recover the difference between the contract price and that realized on the sale; (3) to retain it as his own, and recover the difference between the contract and market prices at the time and place of delivery." *Krebs Hop Co. v. Livesley,* 59 Or. 574, 588, 118 Pac. 165, Ann. Cas. 1913C, 758; *Call v. Linn,* 112 Or. 1, 13, 228 Pac. 127.

to the order of the buyer, after making tender thereof, and maintain an action for the balance of the purchase price, or he may sell the goods for the best price obtainable, and if that is less than the contract price sue the buyer for the difference."

This Court has specified the same remedies as being available to an unpaid hop grower (*Pabst Brewing Co. v. E. Clemens Horst Co.*, 229 Fed. 913, 916, cert. den. 242 U.S. 637):

> "Upon the breach of a contract of sale by the purchaser, the seller is at liberty to fully perform on his part, and when he has done all that is necessary to effect a delivery of the property, so as to pass title to the purchaser, he may store or retain it for the purchaser, or he may resell it as agent for the purchaser. If he pursues the former course, he is entitled to maintain an action for the contract price of the goods. If he pursues the latter, his recovery will be the difference between the contract price and the net proceeds of the sale. But it is not obligatory upon him to adopt either of these courses, and if he does not care to do so he is entitled to recover the difference between the contract price and the market price or value of the property at the time and place of delivery fixed by the contract."

Here the grower chose the first remedy and brought his action for the balance of the purchase price. And the trial Court concluded in effect that the form of action was proper (G.R. 42).

This form of action is no novelty—in essence it is common-law assumpsit for the agreed price of goods sold and delivered. *Brigham v. Hibbard,* 28 Or. 386, 387-388, 43 Pac. 383. As Judge Learned Hand has said, the seller's remedy in this type of case "is really a specific performance of the contract." *Pratt Chuck Co. v. Crescent Insulated Wire & Cable Co.,* 33 F. 2d 269, 272. Upon both legal and equitable grounds, under the facts here, the seller should be able to recover the balance due on the contract, just as in Oregon the buyer could have maintained a suit for specific performance to obtain the crop of hops. *Pittenger Equipment Co. v. Timber Structures, Inc.,* 50 Or. Adv. Sh. 625, 217 P. 2d 770; *Livesley v. Johnston,* 45 Or. 30, 76 Pac. 13, 946, 65 L.R.A. 783, 106 Am. St. Rep. 647; *Livesley v. Heise,* 45 Or. 148, 76 Pac. 952.

A. Application of Sales Act

Appellant argues that the relief sought by appellee can be obtained only under §63 (1) or (3) of the Sales Act,[31] and that neither subdivision is applicable here. We submit that since the "property"

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31 Contrary to appellant's assumption, it seems that appellee's recovery here would be the same under any other remedy provided by the statute, such as §71-151, O.C.L.A., which makes the buyer liable for wrongful refusal to take delivery, and §71-164, O.C.L.A., which makes the buyer liable for wrongful refusal to accept.

Upon the facts here, especially where the grower could not sell to another without consent of appellant because of the chattel mortgage, the measure of recovery is the entire loss occasioned by the buyer's wrongful conduct. *Stevenson v. Puget Sound Vegetable Grower's Ass'n.,* 172 Wash. 196, 19 P. 2d 925. As the Washington Court there said (19 P. 2d at 927): "This cause of action is governed * * * by the fact that there was no available market for the goods in question other than that of appellant, whose contract withheld the sale of the peas by respondent to any other person or persons." In effect the same circumstance is present here (Appendix, post. xxiii).

in the hops passed to the buyer the action lies under §63(1), and that even if §63(1) were not applicable the action would lie under §63(3).

(1) The "property" in the hops passed to the buyer, and the seller may maintain his action for the balance of the purchase price under §63(1) of the Uniform Sales Act.

(This subdivision is in answer to the argument in Appellant's Brief, pp. 48-61.)

§63(1) of the statute (§71-163(1), O.C.L.A.) provides:

> "Where, under a contract to sell, or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods."

The statute provides that the remedy is available to the seller where both the property in the goods has passed to the buyer, and the buyer has wrongfully failed to pay the price. The statute does not contemplate that, after the seller has fully performed and made a valid tender of the goods, the buyer can then prevent the property in the goods from passing merely by wrongfully refusing to accept the goods and to pay for them. Indeed, the Sales Act provides that it is the "duty" of the buyer "to accept and pay for them, in accordance with the terms of the contract to sell or sale." (§71-141, O.C.L.A.)

Here the contract, which was made when the hops were formed and in existence on the vines, was for the sale and purchase of the designated hop crop. The contract involved "specific goods." See above, pp. 39-40, and also *Kenney v. Grogan,* 17 Cal. App. 527, 120 Pac. 433 (olives on the trees); *Breden v. Johnson,* 56 N.D. 921, 219 N.W. 946 (growing hay).

Under Rules 2 and 5 of §71-119, O.C.L.A.,[32] the property in the goods passed to the buyer when the seller completed the work necessary to put the specific goods in a deliverable state and delivered the same in warehouse. *Turner v. Benz Bros. & Co.,* 153 Wash. 123, 279 Pac. 398 (the property in the hay passed when it was baled, even though unpaid seller retained possession); *Inland Seed Co. v. Washington-Idaho Seed Co.,* 160 Wash. 244, 294 Pac. 991 (property in peas passed when delivered to warehouse). And see *Fischer v. Means,* 88 Cal. App. 2d 137, 198 P. 2d 389.

The rule of law is summarized by Professor Williston as follows:

> "When the seller has completed any act remaining to be done by him, the property will thereupon pass without further expression of

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32 "Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer: * * *

"Rule 2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them in a deliverable state, the property does not pass until such thing be done. * * *

"Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or have reached the place agreed upon."

> assent by the parties." Williston on Sales, Rev. Ed., §265.
>
> "The most noticeable circumstance tending to show an intent to transfer the ownership is delivery of the goods to the buyer. It has already been observed [*ibid.*, §265] that even though something remains to be done to put the goods in a deliverable condition, actual delivery of them indicates, in the absence of express contrary statement, an intent to transfer the property immediately. This is still more clearly true where nothing remains to be done but weighing or measuring to fix the price." Williston on Sales, Rev. Ed., §269.

If the dealer had decided to take the clusters (as it did the fuggles), it would have taken the very hops which had been sampled, marked and weighed in by the buyer's agents, and set aside in the warehouse. The delivery was complete in accordance with the terms of the contract. The buyer could not defeat that delivery by a subsequent wrongful rejection of quality. *Katz v. Delohery Hat Co.*, 97 Conn. 665, 118 Atl. 88.

Ordinarily, when the bales of hops had been inspected, marked and weighed in at the warehouse, it would have been considered in the hop trade that the buyer had accepted the quality of the hops. In this case the grower allowed the buyer's request for additional time to consider the quality. The property in the hops passed to the buyer, but subject to being defeated upon occurrence of a condition subsequent if the goods had not been of the

quality bargained for. This distinction between the passing of the property in the goods and the acceptance of quality is carefully drawn by Judge Cardozo in *Henry Glass & Co. v. Misroch,* 239 N.Y. 475, 147 N.E. 71. It is there also said (147 N.E. at 74) that the right which exists, after the property passes, to examine and reject is "a condition subsequent, and its exercise does not bar an action for the price if the goods rejected were in truth in a deliverable state." And see also *Delaware, Lackawanna & Western R.R. Co. v. U. S.,* 231 U.S. 363, 34 S. Ct. 65, 58 L. Ed. 269.

Ordinarily, under the Uniform Sales Act, where the property in the goods has passed to the buyer, the unpaid seller may still retain a "lien" on the goods for the price.[33] Thus, the seller is "not obliged to turn over his warehouse receipts before receiving payment." *Seidenberg v. Tautfest, supra,* 155 Or. at 426. And where, as here, the goods are of a perishable nature, or the buyer has been in default an unreasonable time, the unpaid seller may resell the goods and maintain an action against the original buyer

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33 "The seller's right, therefore, though habitually called a lien is much greater than a lien as that word is strictly defined." Williston on Sales, Rev. Ed., §505.

§71-152, O.C.L.A.: "The seller of goods is deemed to be an unpaid seller within the meaning of this act:

"(a) When the whole of the price has not been paid or tendered. * * *"

§71-153, O.C.L.A.: "Subject to the provisions of this act, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has:

"(a) A lien on the goods or right to retain them for the price while he is in possession of them. * * *"

§71-154(2), O.C.L.A.: "The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer."

for the difference between the contract price and the resale proceeds. (Appendix, post, xx-xxii; §71-160, O.C.L.A.; *Urbansky v. Kutinsky,* 86 Conn. 22, 84 Atl. 317, 320.) Because of the chattel mortgage feature of this case, however, the grower did not in reality have any such right, and it was necessary to resell the hops upon the conditions imposed by the appellant (Appendix, post, xx-xxiii, note 38a, p. 67).

Appellant's contention that it prevented the property in the hops from passing to it simply by refusing to accept and pay for the hops. Appellant argues that it could, and did, prevent the "property" in the goods from passing by the mere refusal to accept and pay for them. On this theory appellant's very wrong would be its defense. Appellant's contention, in counsel's own words, is (Br. 51-52):

> "It follows that if all the hops presented to the buyer for inspection are rejected by it, title to none of them passes to the buyer. This is true whether the hops are rejected rightfully or without justification. * * *
>
> "Inasmuch as the defendant did not accept and request delivery of any of the hops presented to it for inspection, and did not tender to the plaintiff the price of any such hops, title to none of them passed to the defendant."

Even if payment were a condition to the passing of the property in the goods, appellant could not wrongfully prevent the condition from occurring and then defend upon the ground that the condition did not occur.

> "It is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance, either of an obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure. The illustrations of this principle are numerous. * * * One who promises to buy goods if satisfactory cannot set up the failure to perform the condition if by refusing to examine the goods he has prevented the condition from happening. One who agrees to pay for goods on delivery cannot set up lack of delivery when caused by his own act. The principle that prevention by one party excuses performance by the other, both of a condition and of a promise, may be laid down broadly for all cases. The condition is excused because the promisor has caused the non-performance of the condition." Williston on Contracts, Rev. Ed., §677.
>
> "A refusal to examine the promisor's performance, or a rejection of it, not in reality based on its unsatisfactory nature, but on fictitious grounds or none at all, will amount to prevention of performance of the condition and excuse it." Williston on Contracts, Rev. Ed., §675A.

With particular reference to appellant's argument here, Professor Williston says:

> "Where the property in goods which are the subject of a bargain has passed and the buyer wrongfully neglects or refuses to pay for them, the seller may recover the price, even though the buyer refuses to accept delivery. Not only

where the legal title has passed to the buyer is the full contract price recoverable on the buyer's breach of contract, but the same result is reached where the beneficial interest has been transferred and the retention of the legal title by the seller is merely for security, as in the case of conditional sales and analogous situations." Williston on Contracts, Rev. Ed., §1364.

The Oregon Court has also held contrary to appellant's argument. Thus, in *Livesley v. Johnston, supra,* 45 Or. at 47, 76 Pac. at 950, where the hop contract gave the buyer much more latitude than here, Judge Wolverton said:

> "Livesley & Co. [the buyer] could not reject the hops upon mere whim or sheer volition, but must in good faith exercise an honest judgment in the premises, and unless they, by themselves or through their agent, so rejected them, *they would nevertheless be bound for the price.*" (Italics ours.)

Appellant contends (B. 50-51) that the buyer can by the terms of the contract prevent the property in the hops from passing by rejecting the quality of the hops "without justification". This precise point was held to the contrary in *Lehman v. Salzgeber,* 124 Fed. 479. There the buyer was suing the seller for failure to deliver the hops. The seller demurred on the ground that there was a want of mutuality in that the buyer was not bound to accept and pay for the hops. The Court held that payment was not discretionary on the part of the buyer. Judge Bellinger said:

"I am of the opinion that the clause, 'and upon delivery and acceptance of said hops, the said parties of the second part [the buyer] will pay,' etc., does not confer upon plaintiff [buyer] the right arbitrarily to refuse to accept hops when of the quality described; that this clause is intended to fix the time of payment, not to make such payment discretionary on the plaintiff's part; that if the hops are of the quality stipulated for in the contract, and are baled as required by its terms, the obligation of the plaintiff to accept them is absolute."

Since the hops conformed to the contract and the purported rejection was wrongful, the seller may maintain his action for the balance of the price due. As Judge R. S. Bean said in *Brigham v. Hibbard,* 28 Or. 386, 387-388, 43 Pac. 383:[34]

"The first assignment of error is based on the contention that in an action for goods sold and delivered the plaintiff must not only prove a sale and delivery, but an actual acceptance by the vendee. We do not so understand the law. When it is sought to give validity to a contract, void under the statute of frauds, there must not only be a delivery but an actual receipt and acceptance of the goods by the buyer: [citations]. But where the contract itself is valid, a delivery pursuant to its terms, at the place

34 And see *Katz v. Delohery Hat Co.,* 97 Conn. 665, 118 Atl. 88, 90, where it is said:

"* * * the fact that the defendant [buyer] had the right to inspect the fur and refuse to accept it if not of the character and quality called for by the contract did not entitle him to refuse to accept fur of the character and quality called for by the contract, title to which had passed to him by delivery, and thereby deprive the seller of his right of action for the purchase price and remit him to an action for damages for nonacceptance."

> and in the manner agreed upon, if the goods conform to the contract, will sustain an action for goods sold and delivered, without any formal acceptance by the buyer: [citations]. The buyer has a reasonable time after the delivery in which to examine the goods, and, if they are not of a kind and quality ordered, he may then refuse to accept them, and thereby rescind the contract; but this right does not prevent the title from passing nor a recovery by the seller in an action for goods sold and delivered, if in fact they do conform to the terms of the contract: [citation]."

Appellant's contention (Br. 52-56) that this was a "cash sale", and that in such a sale where the buyer wrongfully violates its promise to pay for the goods it cannot be held for the purchase price. Probably Mr. Geschwill could originally have refused to deliver the hops unless appellant was then ready, able and willing to pay for them. However, Mr. Geschwill did not insist upon immediate payment, but upon appellant's demand allowed it additional time to consider the quality of the hops. Appellant, having thereby avoided the obligation to pay immediately upon weighing in the hops, now contends that this nevertheless remained a "cash sale".

Regardless of whether or not a buyer can so rely upon its wrongful conduct for its defense, it is clear that after the seller did not insist upon immediate payment there was no longer a "cash sale".

"And after delivery [in a cash sale] the title remains in the seller *unless he waives the right to*

treat the sale as a cash transaction." *Weyerhaeuser Co. v. First Nat. Bank,* 150 Or. 172, 195, 38 P. 2d 48, 43 P. 2d 1078. The leading case on this subject in Oregon (the Court said in *Keegan v. Lenzie,* 171 Or. 194, 217, 135 P. 2d 717) is *Johnson v. Iankovetz,* 57 Or. 24, 102 Pac. 799, 110 Pac. 398, 29 L.R.A. (N.S.) 709. In the *Johnson* case the rule is stated:

> "If the delivery is voluntarily made, without immediate payment being insisted on, the condition is waived."

Appellant's argument that a conditional title passed to appellant and was revested in the seller. Appellant states the law to be:

> "* * * while delivery to a * * * warehouse pursuant to agreement, does amount to an appropriation with assent, such assent is subject to withdrawal and is withdrawn if, following an inspection, the goods are rejected because not of the quality or condition described in the contract." (Br. 60.)

This only raises the factual issue again. The trial Court found that the hops substantially conformed to the quality provisions of the contract, and we have hereinbefore submitted that the finding is clearly supported by the evidence.

It should be noted that appellant assumes the hops were "unascertained or future goods". We have cited authorities above to show that the hops were "specific goods". The difference here is whether Rule 2 or Rule 4(1) of §71-119, O.C.L.A., governs as to the passing of the property in the

goods to the buyer.[35] Even if the designated hop crop were deemed to constitute "unascertained or future" goods, however, it is clear that the property nevertheless did pass to the buyer (Appendix, post, vi-vii, viii).

Contrary to the statement quoted above from page 60 of appellant's brief, counsel say on page 12:

> "* * * there is no evidence that the defendant expressed any assent whatever, that is, expressed irrevocably a willingness to take as its own the hops appropriated by the plaintiff."

Of course, as appellant has so carefully indicated (Br. 56 et seq.) "assent" as used in the statute and the finding has no such meaning. As Judge Cardozo said in *Henry Glass & Co. v. Misroch,* 239 N.Y. 475, 147 N.E. 71, 73:

> "The defendant insists that the goods are not appropriated to a contract with the assent of the buyer until the buyer has so manifested his approval of their quality as to preclude him thereafter from giving notice of rescission. * * * We think assent to appropriation is something more immediate and certain. It does not signify an acceptance so definitive and deliberate as to bar rescission for defects. * * * It signifies the buyer's willingness to take as his own the

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35 Rule 2: "Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them in a deliverable state, the property does not pass until such thing be done."

Rule 4(1): "Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer upon the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made."

> goods appropriated by the seller, subject to rescission and return if defects are afterwards discovered. * * * This does not mean that a buyer is helpless if the goods when they reach their destination are found to be defective. * * * On the other hand, his assent will stand, and may not be retracted, if the variance is pretended."

There is no question that if appellant had wanted clusters (as it did fuggles) it would have taken the identical bales which its agents had sampled, marked and weighed in at the warehouse. Having assented to the appropriation of those hops to the contract, appellant cannot rescind upon a pretended defect in quality.

(2) Even if appellant's theory were correct that the "property" in the hops had not passed to the buyer, still the seller's action for the balance of the purchase price could be maintained under §63(3) of the Uniform Sales Act.

(This subdivision is in answer to the argument in Appellant's Brief, 47-48.)

§63(3) of the statute (§71-163 (3), O.C.L.A.) provides:

> "Although the property in the goods has not passed, if they can not readily be resold for a reasonable price, and if the provisions of section 71-164(4) are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price."

(§71-164(4)[36] relates to the situation where the buyer repudiates the contract while something remains to be done by the seller, and is not applicable on the facts in this case.)

The relevant portions of the Court's findings are (G.R. 36, 38-39, 40):

> "The agreement provided that defendant would have a prior lien upon said hop crop for such advance payment. and the defendant duly caused said agreement to be filed as a chattel mortgage in the records of Marion County, Oregon." (No error claimed by appellant.)
>
> "Upon delivery as aforesaid plaintiff duly tendered said entire crop of hops to defendant in warehouse at the place specified in said agreement, and plaintiff was at all times ready, able and willing to give complete possession of said hops to defendant in exchange for the price. Defendant did not pay said purchase price or any part thereof except for said partial advance payment. Said hops, as defendant knew, continued to be held by the warehouseman until disposed of as hereinafter stated. Defendant at all times knew it could obtain said hops upon payment of the balance of said purchase price." (No error claimed by appellant.)
>
> "Hops are of a perishable nature; there had been a material decline in the general market

36 §71-164(4), O.C.L.A.: "If, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing toward carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages."

> price and demand for 1947 Oregon cluster hops; and the hops here involved could not readily be resold." (Appellant contests these findings in part, but they are supported by substantial evidence; see Appendix, post, xx-xxiii.)
>
> "Said resale was made pursuant to the stipulation between the parties of March 30, 1948 [after this action was commenced]. By said stipulation, upon certain conditions imposed by defendant, which conditions were met, defendant did not object to the resale and released the chattel mortgage." (No error claimed by appellant.)

Upon these facts appellant's only objection (Br. 47) to the application of the statute is the asserted lack of formal notice to the buyer that the seller was holding the goods as bailee.

The evidence is that, after the hops were weighed in and set aside for the buyer at the warehouse, Mr. Geschwill called at Mr. Paulus' office to see about his money (G.R. 117-118); and, after the purported rejection of the hops, Mr. Geschwill tried to prevail upon appellant to pay for the hops (G.R. 185-186; G. Exs. 24, 43) though appellant continued to refuse payment (G. Exs. 25, 41, 42).

The buyer knew that the goods were in the possesion of the warehouseman, and the buyer knew it could obtain the hops at any time upon payment of the purchase price. The buyer in fact had the notice contemplated by the statute. Any more formal notification by the seller would have been

vain and idle. As it is said in *Lannom Mfg. Co. v. Strauss Co.*, 235 Iowa 97, 15 N.W. 2d 899, 902:

> "Plaintiff has attempted to deliver the goods to defendant and has treated them as belonging to defendant. This was the equivalent of offering to deliver the goods and notifying the defendant that they were held for defendant."

The Oregon court found a similar contention (i.e., that the tender was insufficient) made by the hop buyer in *Seidenberg v. Tautfest,* 155 Or. 420, 425-426, 64 P. 2d 534, to be without merit:

> "It is argued that the seller did not make a sufficient tender of the hops, but we see little merit in such contention. * * * The more pertinent inquiry is: Did the buyer really desire to accept the hops? Or was it seeking an excuse to avoid its contract? When the rejection was made, it would have been a vain and idle thing for the seller to have made further tender of the hops: [citing cases]."

Indeed, in this case appellant had something much more than mere notice—appellant had a recorded chattel mortgage.[37] Mr. Geschwill was forbidden by statute from reselling the hops without appellant's written consent (§23-524, O.C.L.A.; Appendix, post, xxiii).

The situation here is similar to the case where the buyer has possession of the goods but refuses to accept. In such a case Judge Learned Hand has

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37 On appellant's theory—that the hops did not comply with the warranty, and that the mortgage condition had been broken by not repaying the advance—the buyer had such title in the hops that, for example, it could have maintained replevin. *McNeff v. Southern Pacific Co.*, 61 Or. 22, 27-28, 120 Pac. 6. And see note 38a, p. 67.

said (*Pratt Chuck Co. v. Crescent Insulated Wire & Cable Co.*, 33 F. 2d 269, 272) with reference to the statutory notice to the buyer that the seller is holding as bailee:

> "[I]t cannot be argued that the seller puts himself out of court, when by an actual delivery he goes further in his performance than if the goods still remained in his possession. The situation is more favorable to the buyer than that literally prescribed; he has his goods, and need not depend upon the seller's delivery."

In the instant case the buyer not only knew that the goods awaited him at the warehouse, he also knew that as a practical matter the seller could do nothing other than hold the hops for the buyer.

B. Application of Contract

The buyer's printed-form contract has several references to various remedies. Some examples are:

(1) If before or during the time of picking the hops are not of the quality called for by the contract, the buyer is discharged of its obligation to make harvesting advances, and the contract then stands as a chattel mortgage on all the crop for the advances previously made (G.R. 11-12).

(2) Upon starting picking the seller is required to insure the crop for its full market value against loss by fire, with the full loss payable to the buyer; and if the seller does not obtain such insurance the buyer may do so, and the seller is then required to repay the buyer for the premiums with interest (G.R. 12).

(3) If the seller assigns the contract, leases the hop yard, suffers any judgment lien thereon, etc., without the written consent of the buyer, the buyer may at its option rescind and "immediately" have a right of action against the seller "for the recovery of any and all damages resulting on account thereof to the said buyer" (G.R. 14-15).

(4) The entire crop is mortgaged as security for the buyer's advance payments and "liquidated damages," and in case the seller parts with possession of any of the hops, or removes any of them from the county, the buyer may take possession and may sell the crop at public or private sale (G.R. 14).

(5) The contract contains a "liquidated damages" provision (G.R. 13) to which appellant directs particular attention (Br., 62-63): "The parties hereto further agree that upon the breach of the terms of this contract by either party, the difference between the contract price of said hops and the market value thereof at the time and place of delivery shall be considered and is hereby agreed to be the measure of damages, which may be recovered by the party not in default for such breach, and the said difference between the said contract price and the market value thereof is hereby agreed and fixed and determined as liquidated damages."

(1) *Appellant's argument on "liquidated damages" clause.*

Appellant argues (Br., 62-63) that, assuming it wrongfully rejected the hops, nevertheless the

quoted "liquidated damages" provision is "binding" upon the grower,

> "and, as a result, that he is precluded from recovering the price of such hops and is limited in his recovery to the difference between the contract price selected by him and the market value at Mt. Angel, Oregon, on the date of delivery of the hops to the warehouse in that city. Inasmuch as the contract price of the plaintiff's hops and the market value of prime quality hops were exactly the same, at the time and place of delivery, the plaintiff was not damaged to any extent whatever and is not entitled to recover anything in this action * * *" (Applt's Br., 63.)

Appellant declares that the clause is not for "liquidated damages," as the contract says, but rather a limitation on appellant's liability (Br. 64-65), and at the same time a "good faith attempt" to provide the grower "fair compensation" (Br., 68). "This means that there can be no recovery whatever by the plaintiff in this action, but it does not follow that this result imposes any undue hardship on him."[38] (Br., 69.)

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38 " 'The law, following the dictates of equity and natural justice in cases of this kind, adopts the principle of just compensation for the loss or injury actually sustained, considering it no greater violation of this principle to confine the injured party to the recovery of less than to enable him by the aid of a court to extort more. * * * This principle of natural justice, the courts of law, following courts of equity, have, in this class of cases, adopted as the law of the contract; *and they will not permit the parties by express stipulation or any form of language, however clear the intent, to set it aside.'* " *Wilhelm v. Eaves,* 21 Or. 194, 200, 27 Pac. 1053, 14 L.R.A. 297; Italics ours.

" 'Just compensation for the injuries sustained is the principle at which the law aims, and the parties will not be permitted by express stipulation to set this principle aside.' " *Electrical Products Corp. v. Ziegler Drug Stores, Inc.,* 141 Or. 117, 125, 10 P. 2d 910, 15 P. 2d 1078.

As we have seen, appellee delivered the hops in warehouse early in September. Appellee could not then have resold them to anyone else. Appellant did not attempt to reject them until the end of October. By law an unpaid seller may, but is not required to, resell the goods, but appellee could not have resold these hops without appellant's written consent as mortgagee.[38a] In fact appellee could not then have resold the hops because of the very restricted market. (See also Appendix, post, vi-vii, x, xx-xxiii.)

(2) *Interpretation of "liquidated damages" clause in relation to the whole contract.*

The rule for interpreting such a "liquidated damages" clause in a hop contract has been indicated by the Oregon Court in *Wigan v. LaFollett,* 84 Or. 488, 497, 499, 165 Pac. 579, as follows:

> "To begin with it seems that the contract is a mutual one and binds the purchasers to accept and pay for the crop raised on the premises,

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38a §23-524, O.C.L.A.: *"If any bailee,* with or without hire, *including every mortgagor of personal property* having possession of property mortgaged, or any purchaser or lessee of personal property, obtaining the possession thereof under a written or printed contract of conditional sale, providing that title thereto shall not vest in the purchaser until the unpaid balance of the purchase price is wholly paid for, and before same is wholly paid for, shall embezzle or wrongfully convert to his own use, or shall secrete or conceal, with intent to convert to his own use, or *shall* injure, destroy, *sell,* give away, remove from the county where situated when obtained, *without the written consent of such bailor or vendor,* or shall fail, neglect, or refuse to deliver, keep, or account for, according to the nature of his trust, any money or property of another delivered or intrusted to his care, control, or use, and which may be subject of larceny, *such bailee, upon conviction thereof, shall be deemed guilty of larceny* and punished accordingly; * * *"

Before the statute was amended to its present form, treating a mortgagor of personal property as a bailee, it was held that a mortgagor could sell the personalty subject to the lien of the mortgage. *Jacobs v. McCalley,* 8 Or. 124. But now after the amendment that can no longer be done. *Mayes v. Stephens,* 38 Or. 512, 518, 63 Pac. 760, 64 Pac. 319.

> as well as the vendors to sell the same although there should be less than 30,000 pounds, the maximum amount bargained for. It was a mutual adventure. It is not a mere option in favor of the purchasers. * * *
>
> "In making a memorandum of the agreement the parties used a lengthy, ready-made form in print, adapted to nearly all conditions. In construing the same it is not a question as to what one clause of it indicates, but what the whole agreement means, viewed in the light of the prevailing conditions and circumstances which were within the contemplation of the parties thereto at the time of its execution. * * * According to the construction which we have given to the contract it is incumbent upon the plaintiffs [buyers] to carry out the same, unless there is a default on the part of the vendors; * * * "

Thus, the intent of the parties is to be determined from the clause in relationship to the whole contract and the attendant circumstances, bearing in mind that the agreement is not a mere option in favor of the buyer but obligates each party to perform.

The "liquidated damages" clause here by its language relates to an action for damages, and not to an action such as this for the balance of the price. There is a well-recognized distinction between an action on the contract for the price and an action for damages for breach of the contract. This clause relates to a breach of the contract while it is still executory. Here the seller had fully performed and

made a valid tender—on his part the contract was executed.

The damage provision does not say it provides an exclusive remedy, and any such construction would be inconsistent with the rest of the contract. Thus, for example, if the seller should sell or lease the hop yard in the middle of the year, the buyer would not be required to wait until the time for delivery, but by another clause "immediately" the buyer would "have the right of action against the said seller for the recovery of any and all damages resulting on account thereof to the said buyer" (G.R. 14-15). Indeed, the buyer has such an immediate right of action for the recovery of any and all damages "in case the said seller shall violate *any* of the provisions and conditions in this contract on his part to be performed." (G.R. 15.)

The clause appears in the buyer's form contract for the protection of the buyer. Its object, however, is not to attempt to deny the seller any relief whatsoever in case the buyer defaults in payment, but rather to give the buyer an additional remedy in case the seller breaches the contract. *Without* such a clause this Court held that, in case of breach by the seller, the buyer did not have a lien upon the hop crop for damages, but only for advances. *Lilienthal v. McCormick,* 117 Fed. 89, 98-99. *With* such a clause the Oregon Court held that, in case of breach by the seller, the buyer had a lien on the hops for both damages and advances. *McNeff v. Southern Pacific Co.,* 61 Or. 22, 30-31, 120 Pac. 6.

By its terms the clause relates to damages for breach and not to an action for the price as here. It purports to relate to both parties alike. It does not purport to provide an exclusive remedy for either party. It does not purport to deny either party any relief whatsoever. To construe it otherwise would nullify other provisions of the contract. The only reasonable construction is that the clause gives a permissive, but not an exclusive, remedy to the injured party, and also operates to extend the buyer's lien in case of breach by the seller. It was clearly not intended to substitute a sham or illusory remedy for the practical and long-established remedies applicable in such cases.[39]

(3) *The reason for the clause fails upon the facts of this case.*

The "liquidated damages" clause states a measure of damages for which sellers frequently elect to sue defaulting buyers, for the reason that ordinarily sellers are able readily to resell the goods on an open market and thereby promptly recoup a portion of their losses. But such are not the facts in this case. Here there was no "open" market because dealers generally will not consider the purchase of hops under mortgage to another dealer, even if the

39 The clause imposes the same measure of damages for any breach of any term, however trivial. Further, it provides no certain measure of damages for any situation where the amount of damages would otherwise be more difficult to ascertain or compute. The clause would be harmless if restricted to a situation where the law would provide the same measure of damages in the absence of the provision. But if the clause were sought to be applied in any other situation, it would under Oregon law result in an unenforceable penalty or forfeiture. *Electrical Products Corp. v. Ziegler Drug Stores,* 141 Or. 117, 10 P. 2d 910, 15 P. 2d 1078.

grower could have obtained the mortgagee's permission to resell. There was practically no "market" because few purchases were being made by dealers. Where the reason for the rule of damages fails, the rule is not applied. §71-164(2); *Hockersmith v. Hanley,* 29 Or. 27, 36, 44 Pac. 497.

(4) *Upon the facts appellant cannot assert its construction of the clause.*

Where the terms of a buyer's contract so severely restrict the power of a seller to dispose of the goods upon an open market, and where a buyer is not disposed to waive or ameliorate the restrictions (G.R. 123-125, 468), the buyer can hardly declare that the seller's damages must be assessed as if the seller had in fact had full power to resell.

(5) *Oregon cases interpreting similar clauses.*

Such contractual provisions are not construed to exclude other remedies provided by law. For example, in *McNeff v. Southern Pacific Co.,* 61 Or. 22, 120 Pac. 6, the hop contract contained a chattel mortgage provision which (61 Or. at 24) specified that upon breach the buyer could foreclose. Instead, after condition broken, the mortgagee brought replevin to recover the possession of the hops. The Court held (61 Or. at 29) that the action would lie, and that foreclosure was not exclusive as a remedy.

Appellant cites (Br., 65) *Daniels v. Morris,* 65 Or. 289, 130 Pac. 397, 132 Pac. 958, as authority in its favor. We believe the case to be authority to the

contrary. When the hops were tendered the market was below the price fixed in the contract, and the plaintiffs-buyers "were anxious to be relieved from taking the hops." The buyers rejected the hops, claiming them to be slack-dried, but on trial it was found that they were prime. In the *Daniels* case, however, the sellers resold the hops for their own account and also kept the advances, the total being in excess of the contract price. The buyers sued to recover the advances. By the final judgment of the Court the growers were made whole, but the buyers recouped the overplus to apply on the advances. On rehearing the Court explained its decision as follows (65 Or. at 299):

> "They [the growers] claim only $800 damages for the alleged breach by the plaintiffs of the contract pleaded, and not only kept $1,576.32 advanced, *but also resold the hops for their own account,* keeping the proceeds. *By so doing they waive performance of the contract by the plaintiffs [buyers], and can only hold them for damages* resulting from the breach of the agreement. Compensation is all that can be allowed in such instances. The defendants are entitled to be made whole, and no more. They cannot sell the hops for their own account, and also keep the money paid on the purchase price beyond enough to cover the damage they have suffered." (Italics ours.)

The contract in the *Daniels* case contained a damage provision similar to the one here. The growers did not elect to sue on the contract for the

price, and accordingly the damage clause was relevant. The Court said, however, that the growers could have done as Mr. Geschwill has done here, i.e., hold the goods for the buyer "and maintain an action for the balance of the purchase price."

In the *Daniels* case the Oregon Court recognized the right of the seller under such a contract as this to sue for the contract price. The Court insisted upon just compensation. The Court did not hold that the seller's recovery, notwithstanding the buyer's default, should be zero as appellant here contends. Nor has any other Court, so far as we can determine, applied such a rule to a situation like ours.

(6) *The "liquidated damages" clause gives appellant no license to repudiate its contract with impunity.*

While the remedy which the seller has pursued here—an action for the balance of the purchase price—has long been well-established in law, it is in effect a specific performance of the contract. And the same facts, and the same reasons, exist in this case as would support a suit for specific performance by the vendor. The contract involves a commodity of speculative value in the sense that the hop market is subject to extreme fluctuation. The measure of the grower's damages, as proposed by appellant, would be grossly inadequate. In Oregon the buyer could obtain specific performance, and the seller should have mutuality of remedy. As

it is stated in Walsh on Equity, §68, p. 341:

> "A vendor of land or of a unique chattel or of stock or other personalty of speculative value may enforce specific performance against the purchaser just as the purchaser may enforce specific performance against him, and for exactly the same reason, viz., the inadequacy of damages. * * * The contract gives him a right to the purchase price, and to permit the purchaser to pay damages at his option instead of performing the contract would surely be a 'travesty of justice,' as it has been called by the Supreme Court of the United States."[40]

The fact that there is a liquidated damages clause in the contract does not vary the result. In *Armstrong v. Stiffler,* 189 Md. 630, 56 A. 2d 808, it was unsuccessfully contended that the remedy provided by the contractual damage clause was exclusive, and that a suit for specific performance would not lie. In holding to the contrary the Court said (56 A. 2d at 810):

> "Normally contracts are made to be performed, not to give an option to perform or pay damages. [Citation.] Forfeiture and damage clauses are means to insure performance, not optional alternatives for performance. [Citation.] There is nothing in these option agreements which indicates that the liquidated

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40 "The jurisdiction of courts of equity to decree the specific performance of agreements is of a very ancient date, and rests on the ground of the inadequacy and incompleteness of the remedy at law. Its exercise prevents the intolerable travesty of justice involved in permitting parties to refuse performance of their contracts at pleasure by electing to pay damages for the breach." Mr. Chief Justice Fuller in *Union Pac. R. Co. v. Chicago, R. I. & P. R. Co.,* 163 U.S. 564, 600, 16 S. Ct. 1173, 41 L. Ed. 265.

> damage clause gives a license to break the contract and pay damages."

On a parity of reasoning, there is nothing here which indicates that appellant had license to repudiate the contract with complete impunity.

CONCLUSION

We respectfully submit that the trial Court's findings are clearly supported by the facts, that the Court's conclusions are sound in law, and that the findings and conclusions support the judgment.

Respectfully submitted,

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Portland, Oregon
July 20, 1950.

APPENDIX A

Explanatory Note: This appendix consists of the trial Court's findings of fact (G. R. 35-41), references to appellant's specifications of asserted error (Br. 10-16), and citations to the supporting evidence. The portions of the findings which are questioned by appellant are printed in italics, and the number following each italicized portion corresponds to the number of appellant's asserted error relating thereto.

Finding "1. At the time of the commencement of this action and at all times herein mentioned plaintiff was and is a citizen of the State of Oregon and defendant was and is a corporation incorporated and existing under the laws of, and a citizen of, the State of New York."

Asserted error: None.

Finding "2. The amount in controversy herein exceeds, exclusive of interest and costs, the sum of $3,000; and this Court has jurisdiction of the subject-matter, the parties and the cause of action."

Asserted error: None.

Finding "3. On or about August 18, 1947, plaintiff as seller and defendant as buyer entered into the written agreement received in evidence herein. *By said agreement plaintiff contracted to sell and defendant contracted to buy the entire crop of cluster hops grown by plaintiff in 1947 on certain prem-*

ises in Marion County, Oregon.[1] Pursuant to said contract plaintiff cultivated and completed the cultivation of said premises and *duly harvested, cured and baled said hops grown thereon in said year in a careful and husbandlike manner.*[2] (As part of the same transaction defendant also contracted to buy a certain crop of fuggle hops from plaintiff, but said fuggle hops were duly paid for and there is no controversy here on that matter.)"

Asserted error No. 1 (Applt's Br. 10) to finding that the parties bargained for the "entire crop". This finding uses language from the contract (G. Ex. 1; G. R. 8):

> "...the seller does hereby bargain and sell,.... and agrees to deliver . . . to the buyer, . . . *entire crop estimated at—twenty thousand*—thousand pounds (*20,000* lbs.) of *Cluster* hops grown on said premises . . ." (The italicized matter was typewritten on the printed form contract.)

The printed clause to which appellant refers is (G. Ex. 1; G. R. 10):

> ". . . the buyer . . . is to have the right to inspect the same before acceptance, and to accept any part less than *the whole of the hops so bargained for,* should for any cause the quantity of hops of the quality, character and kind above described, and which shall have been raised, picked and harvested from said premises and tendered for acceptance be less than the amount herein bargained and sold; . . ." (Italics ours.)

Thus, the parties contracted with respect to the "entire crop," although the buyer might elect, upon a certain condition, to take less than the entire crop. This condition did not occur (post, pp. vi-viii).

Asserted error No. 2 (Applt's Br. 10-11) to finding that the hops were properly handled. Mr. Oppenheim, president of appellant, testified (G. R. 434):

> "I would say that the curing and drying was okeh; nothing wrong with that."

Mr. Paulus, local representative of appellant, testified (G. R. 357-358) that the hops were in sound condition with respect to drying, curing, baling, handling, and keeping qualities.

Mr. Fry, appellant's field man who negotiated the purchase of the Geschwill hops and examined them for appellant, found that the hops were properly cured, dried and baled. He admitted (G. R. 293, 316) that he had complimented Mr. Geschwill on his nice job of drying.

The testimony of the buyer's witnesses confirms that of Mr. Geschwill (G. R. 133-135, 172-173) and Mr. Sprauer (G. R. 221-224) that the hops were properly cured, dried and baled.

This specification of asserted error seems to be based on counsel's supposition that the parties might possibly have contemplated that Mr. Geschwill would pick the cluster hops burr-by-burr to eliminate the slight touch of mildew. The evidence showed that, before the contract was made, the buyer knew Mr. Geschwill was having the hops picked by machine, and saw his fuggle hops being picked by the machine (G. R. 323, 450). There is no

evidence that the parties considered any different method of picking. The evidence does show, however, that the machine operated to reject a large percentage of any blighted hops as waste matter (G. R. 143, 238, 414-415), so that the hops in the bale actually showed less mildew than they did shortly before harvest when the purchase was contracted.

Further, the testimony is that such burr-by-burr picking was not feasible, if possible at all, and especially not in a yard such as Mr. Geschwill's where the touch of mildew was slight and scattered and not localized (W. R. 302; G. R. 140, 270-271; W. R. 100-101, 124, 128).

Mr. Ray, a witness for the buyers in all three cases, testified that some years ago he had picked selectively a yard which is located outside the United States, and of which he is part owner (W. R. 226-227, 241). As to Oregon yards in 1947, however, even Mr. Ray testified (W. R. 227) that such selective picking was not practical.

Finding "4. In 1947 there was, as defendant knew, wide-spread mildew in hop yards in the Willamette Valley in Oregon. The parties entered into said cluster hop agreement shortly before picking time, and the hops which defendant contracted to buy were then formed and in existence on the vines. *Defendant knew that said hop crop then showed some mildew and would in normal course show such mildew when picked and baled.*[3] Such mildew in said hops did not become more prevalent or pronounced after said agreement was entered into."

Asserted error No. 3 (Applt's Br. 11, 38) to finding that appellant knew mildew existed and would show in baled hops. Mr. Oppenheim came out to Oregon to inspect the hop yards "when the downy mildew infestation was at its height" (G. R. 426). He found the downy mildew in the Willamette Valley hop yards "was apparent to anybody with eyesight" (S. R. 310). He then gave orders to buy more hops (G. R. 343-344; S. R. 245, 310). After preliminary negotiations by Mr. Paulus, Mr. Fry was authorized to purchase Mr. Geschwill's hops (G. R. 88-90, 343). When Mr. Fry went out to try to buy the cluster hops from Mr. Geschwill he saw the hops on the vine (G. R. 291-292). The slight touch of mildew was then visible upon looking at the hops on the vine (G. R. 96). Not finding Mr. Geschwill at home, Mr. Fry followed Mr. Geschwill into Mt. Angel, bargained with him for several hours, out-bid another buyer, had Mr. Paulus talk to Mr. Geschwill on the telephone, and then followed Mr. Geschwill home at night to sign him up on a sales slip (G. R. 90-96, 152, 291-292, 312, 343). Mr. Fry was most anxious to buy the hops and knew what he was buying.

(Compare uncontested parts of Findings 6 and 11, below, pp. vi, x.)

(As to the custom of buyers to inspect hop crops in the field see G. R. 149, 152-153, 189, 313, 449; S. R. 310, 312.)

The baled hops showed less mildew than the hops on the vine at the time the purchase was contracted, because the picking machine operated to throw out mildewed hops (G. R. 143, 238-239, 414-415); but naturally the harvested hops did show some of the same mildew that the hops in the field had shown (G. R. 143; W. R. 318, 465).

Finding "5. By said agreement defendant contracted to make an advance payment to plaintiff of $4,000 in order to enable plaintiff to defray the necessary expenses of cultivating and picking said hops and of harvesting and curing the same. The agreement provided that defendant would have a prior lien upon said hop crop for such advance payment, and the defendant duly caused said agreement to be filed as a chattel mortgage in the records of Marion County, Oregon."

Asserted error: None.

Finding "6. Said agreement provided in substance that if said growing crop at or before the time of picking was not in such condition so as to produce the quality of hops called for under the terms of the agreement then the defendant buyer would be discharged from any obligation to make said advance. Before and at the time of picking defendant knew that there was mildew in plaintiff's said crop of cluster hops and that said crop when picked and baled would in normal course show such mildew. Defendant elected to and did make plaintiff said advance. Said mildew in said crop did not thereafter become more pronounced or prevalent."

Asserted error: None.

Finding "7. *Plaintiff did everything he was bound to do for the purpose of putting the specific crop of cluster hops in a deliverable state*[4] and delivered the same in warehouse at the place and within the time agreed upon in said contract. In

September, 1947, after said hops had been picked, dried, cured and baled as aforesaid, plaintiff, *with the assent of defendant, delivered at Schwab's warehouse in Mt. Angel, Oregon, all of said hops and set same aside for defendant.*[5] Thereafter, defendant inspected, sampled, marked and weighed said hops at that warehouse. The bales of hops constituting said crop were identified, segregated and *appropriated to the contract.*[5] *Plaintiff duly performed all of the terms and conditions of the agreement between the parties on his part to be performed."*[6]

Asserted error No. 4 (Applt's Br. 11) to finding that grower did everything required to put hops in deliverable state. As to proper harvesting, curing and baling, see abstract of evidence above, pp. iii-iv.

Appellant's argument here (Br. 11, 39) is only that the hops showed some mildew and for that reason should not be considered as "prime quality." That was an issue of fact. There is substantial evidence that the hops were "prime quality." So testified Mr. Geschwill (G. R. 134-135, 173 et seq.), Mr. Faulhaber (G. R. 202), and Mr. Sprauer (G. R. 223-224). Mr. Schwind, the only brewmaster who testified, said that these hops were "good hops" such as he would have used in his brewery (G. R. 209-210).

Mr. Oppenheim originally found the hops of "fair quality" (G. Ex. 20; G. R. 438), and on trial testified that if they had been free of mildew "they would have been a good, prime hop" (G. R. 438). Mr. Ray thought that "the quality was not damaged by mildew" (G. R. 481) though he would not have graded

most of the samples as "prime" because of the mildew (G. R. 407). Mr. Franklin, who admitted he "didn't see a Willamette Valley hop in 1947," graded the samples as not prime only because of the evidence of mildew (G. R. 494-495).

See further, abstracts of evidence, below, pp. xv-xx.

Asserted error No. 5 (Applt's Br. 11-12) to finding that grower, with buyer's assent, delivered the hops at warehouse and set them aside for buyer. Mr. Geschwill hauled the hops to Schwab's warehouse, the only bonded warehouse in Mt. Angel, for delivery to the buyer (G. R. 100, 344-345), pursuant to the contract (G. R. 8). The buyer there subsequently inspected, graded, numbered and weighed each bale (G. Ex. 6-A, 6-B; G. R. 109-111, 163, 300, 314, 316). The bales were stamped with, and identified by, the warehouse number, the State inspection number, and the buyer's number (G. R. 316; and see W. R. 307-308). On the pleadings it is admitted that the hops at the warehouse "with the defendant's assent" were made available to defendant for inspection, and that defendant sampled and weighed the hops (G. R. 29). The hops remained in the warehouse under the buyer's chattel mortgage until, after the action was brought, they were sold pursuant to the conditions imposed by the buyer (G. Ex. 28; G. R. 122-132; Finding 13).

Appellant questions this finding (Br. 11-12, 60-61) only upon the legal significance of the word "assent". This legal question is discussed in the main part of our brief.

Asserted error No. 6 (Applt's Br. 12) to finding that appellee duly performed conditions precedent. Appellant's contention here is only that, "if the con-

tract is construed in the manner advocated by the defendant" (Br. 12), the hops did not conform thereto. The substantial evidence supporting the finding that the hops did conform to the contract is referred to above, pp. vii-viii, and below, pp. xv-xx.

Finding "8. Said hops so weighed in by defendant consisted of 130 bales, and had a total net weight, as determined by defendant, of 26,536 pounds. Said hops contained eight per cent leaves and stems and less than three per cent seed content, as determined by an authorized governmental agency in accordance with said agreement."

Asserted error: None.

Finding "9. Said agreement provided that the price to be paid for the hops to be delivered would be the grower's market price for the kind and quality of hops delivered containing eight per cent of leaves and stems and six per cent or more of seeds, and in the event the seed content was less than three per cent then the price would be increased ten cents per pound. Pursuant to said contract on or about September 17, 1947, plaintiff selected the price of 85 cents a pound which was then said grower's market price for such hops containing six per cent or more of seed content, and plaintiff duly notified defendant in writing of such selection. Since the seed content was less than three per cent, the contract price for said hops was 95 cents per pound. The total contract price was $25,-209.20."

Asserted error: None.

Finding "10. Upon delivery as aforesaid plaintiff duly tendered said entire crop of hops to defendant in warehouse at the place specified in said agreement, and plaintiff was at all times ready, able and willing to give complete possession of said hops to defendant in exchange for the price. Defendant did not pay said purchase price or any part thereof except for said partial advance payment. Said hops, as defendant knew, continued to be held by the warehouseman until disposed of as hereinafter stated. Defendant at all times knew it could obtain said hops upon payment of the balance of said purchase price."

Asserted error: None.

Finding "11. On or about October 30, 1947, defendant rejected and refused to pay for said hop crop tendered by plaintiff. On several occasions after said balance became due and owing, plaintiff duly made demand on defendant for the payment thereof. Defendant refused to pay for said hop crop on the particular ground that said hops were blighted and on no other specific ground. *By the term "blighted" it was meant that the hops showed some mildew effect as stated above.*[7] *At the trial defendant advanced the same specific objection to the hops.*[8] *Upon the facts the claimed defect was not material.*[9] Said crop of hops was not any more blighted or mildewed than when defendant contracted to buy the same or when defendant elected to make the advance payment as aforesaid. *Said hops when tendered were merchantable.*"[10]

Asserted error No. 7 (Applt's Br. 12) to finding that "blighted" refers to mildew. Mr. Oppenheim, for example, testified (S. R. 318) that "badly blighted means mildew damage. It is blight from the mildew."

(a) Amount of mildew. Appellant's contention with respect to this finding is only that there was more than "some" mildew effect (Br. 12, 36). There is substantial testimony, from witnesses who knew the whole crop, that there was only a slight touch of mildew (G. R. 77-78, 111, 146, 158, 205, 229). As shown by other findings, such hops as these moved freely in the trade as good, merchantable hops under the same type of contracts (pp. xv-xix).

In this connection, appellant relies (Br. 29-30, 37) upon the testimony of witnesses who saw only old samples (G. R. 486, 495), and particularly upon an unique experiment which appellant had Mr. Hoerner make from such deteriorated samples for the purpose of testifying. Shortly before the trial, and without any notice to appellee (G. R. 320), Mr. Oppenheim had Mr. Paulus (G. R. 339-340) send Mr. Fry (G. R. 317, 375) with a sample, purportedly from these hops, to Mr. Hoerner. Mr. Paulus (G. R. 339-340) and Mr. Fry (G. R. 317-318) each claimed to have selected the sample, and it was purported to be from bale 40 (G. R. 340) which Mr. Ray said (G. R. 482-483) contained the largest quantity of nubbins.

Mr. Hoerner took a sample of less than an ounce (he stated the amount variously as 23.7 and 20.5 grams) to represent the crop of 26,536 pounds (G. R. 378, 385, 38). On appellant's instructions he separated out, not the mildewed nubbins, but all the

hops which showed the slightest microscopic evidence of mildew on any petal, and called them "affected cones" (G. R. 386). By using the full weight of such whole cones he was able to find that 70.1% of the minute sample constituted "infected" material (G. R. 378). At the same time he arrived at a figure of 60.44% on another minute sample (G. R. 380-381, 503). He admitted that, upon the same basis, the vines in the Oregon State College model yard that year ran 97% mildew, with 60 to 70% cone infection (G. R. 368, 387; S. R. 270).

Mr. Paulus and Mr. Hoerner admitted that the experiment was unique and unprecedented (G. R. 340-341, 385; S. R. 272). Mr. Ray and Mr. Oppenheim admitted that such microscopic examinations were never made in the trade (G. R. 451, 489). The experiment was not designed to, and did not, show the actual amount of mildew in the crop. Mr. Oppenheim testified that, to determine whether the value of the hop was impaired, it would be necessary to consider the amount of mildew discoloration on each burr—a trace of mildew on the petals would not impair the value of the hops (S. R. 316, 318-319).

The evidence showed that the buyer was willing to accept hops which were like those used by Mr. Hoerner in his experiment. The buyer found (G. R. 436, 465, 470, 477) that hops like the samples from bale 100, Exhibit 34-K, and bale 130, Exhibit 34-B, were acceptable, and Mr. Hoerner found those samples to be about the same as those he used in his experiment (G. R. 382, 384).

(b) *Reason for rejecting hops.* Appellant states (Br. 12) ". . . the undisputed evidence establishes that the defendant rejected the plaintiff's hops because of substantial damage by mildew." The evidence is that Mr. Oppenheim had decided to reject the hops before any inspection of the full crop had been made (G. Exs. 48, 17).

He had then seen a few early "type" samples; but as Mr. Haas testified (W. R. 462), "you cannot inspect a lot by simply having one or two type samples." Mr. Oppenheim himself said (S. R. 315), "I would not consider a type sample as representative of the entire lot. That would be a very unfair position to take." (And see G. R. 347.) Mr. Oppenheim had his men in Oregon go through the mere form of an inspection of the full crop. As he explained (G. R. 464), "We have got to go through the form, necessarily, the form of looking at the hops." No one who saw the full crop had any authority to accept the hops in whole or part; instead they had positive instructions not to accept (G. R. 317, 464).

Previously Mr. Oppenheim had found the hops "fair quality" (G. Ex. 20), and subsequently he was willing to accept all the hops which ran like the samples from bales 70, 100 and 130 (G. Exs. 26, 46). Mr. Paulus, Mr. Geschwill and Mr. Faulhaber could not tell any difference between those samples and the others—if they were acceptable the whole lot was acceptable (G. R. 118-120, 183, 201-202, 335, 336, 356, 360).

Mr. Oppenheim said in effect that he decided to reject the hops from his office in New York, before inspection in Oregon, because of mildew. In view

of his prior and subsequent opinions, and in view of the fact that there was no good-faith inspection of the full crop, the Court could properly infer that actually appellant rejected the hops for other reasons, such as that the Oregon crop was not as short as expected and the market would undoubtedly fall off (G. R. 245-247, 265, 453), or that grain restrictions on brewers would curtail their production and thereby reduce the demand for hops (S. R. 323; W. Ex. 3-U), or that the prospect of a lowered tariff on imported hops would affect the market for domestic hops (S. R. 324).

Asserted error No. 8 (Applt's Br. 12-13) to finding that on trial appellant had only the same specific objection. On trial the buyer's witnesses testified that the only ground upon which the samples could be said not to be "prime" was that they showed evidence of mildew. Mr. Oppenheim said (G. R. 438):

> ". . . if they had been entirely free of blight, they would—I would have said they would have been a good, prime hop; they were not as badly blighted or as red as some other hops which I had seen other samples of, Oregon hops."

Mr. Ray judged that the hops had had a good flavor (G. R. 489), and thought that the quality was not damaged by mildew (G. R. 481). Nevertheless, because of the mildew, he would not grade the samples as "prime", except for one sample (G. R. 481-483). Mr. Franklin down-graded the samples only on the basis of mildew (G. R. 493-495).

Hops can show some evidence of mildew and still be taken under "prime quality" contracts, especially if the hops have other redeeming characteristics (W. R. 315-316; G. R. 259). Neither Mr. Ray nor

Mr. Franklin, witnesses who were produced by the buyer as experts on the quality of these hops, had seen them on the vine or in the bale, and they testified only from deteriorated samples seen for the first time in the court room (G. R. 486, 495). The true character of the hops could not be determined from such old samples (G. R. 215-216, 476; S. R. 282-283, 289).

Asserted error No. 9 (Applt's Br. 13) to finding that the claimed defect (mildew) was not material. See abstracts of evidence under Finding 7 (pp. vii-viii), Finding 11 (pp. xi-xiv), and Finding 12 (pp. xviii-xx).

Asserted error No. 10 (Applt's Br. 13) to finding that the hops were merchantable. Appellant (Br. 13) misconstrues "merchantable" to mean "salable at some price". The finding uses "merchantable" in its usual acceptation: "Fit for sale; vendible in market; *of a quality such as will bring the ordinary market price.*" (Black's Law Dict., 3d ed.; italics ours.)

This was a market-price contract. The buyer's printed form contract was qualified by the buyer's mimeographed form rider attached to it, which rider provided (G. Ex. 1; G. R. 8-9): "The price to be paid for the hops to be delivered shall be the Grower's market price for the kind and quality of hops delivered . . ." with a sliding scale for leaf and stem content and a premium for seedless hops such as Mr. Geschwill's.

These hops were of the quality which brought the ordinary market price, i.e., were merchantable (pp. xviii-xix, below). The Grower's market price for fuggle hops, being resistant to mildew, was 90c a pound;

and the Grower's market price for cluster hops, being more susceptible to mildew, was 85 cents a pound. (Uncontested Finding 9, above; S. R. 240, 311; G. R. 156, 360-361.) Even Mr. Ray testified that such was the going market price for good, average-quality cluster hops. He said (W. R. 255):

> "During September buyers were anxious to buy hops selling at 85 cents a pound, 85 cents a pound for prime-quality clusters, Oregon hops, and it was my opinion that 85 cents a pound was paid for cluster hops that were not fully prime in quality, and I would call those good hops."

The hops were raised for the market and were being bought for re-sale to brewers. Their merchantability is the "real question of fact" for determination, as this Court said in affirming the judgment for the grower in *Wolf v. Edmunson,* 240 Fed. 53, 59. While Mr. Oppenheim suggested that the buyer could deliver only "prime hops" to brewers (G. R. 428; S. R. 308), he admitted that hops, though purchased as "prime", were sold simply "as good hops" (G. R. 452). Mr. Oppenheim admitted that on re-sale the appellant might call the hops "choice" or "prime" because there are no fixed standards for those terms (S. R. 309-310) and they are not resold on written specifications (G. R. 452). The only brewmaster who testified was Mr. Schwind who had examined samples of the Geschwill hops when they were fresh. He said (G. R. 209-210):

> "A. When we buy from a grower or dealer, I look for good hops. He can call them what he wants to, prime, choice, or standard. I think I should know a good hop from a poor hop.

Q. In your opinion, were these good hops?

A. Was good, average hops."

The Court properly found that the hops were "merchantable" in that they were of the quality such as brought the ordinary market price, and in that they were "good hops" from the standpoint of a brewer.

Finding "12. *Plaintiff delivered the identical hop crop which defendant contracted to buy.*[11] *Defendant did not rely upon any warranty or representation, whether contained in the contract or otherwise, that said crop of hops would be any different in condition or quality than said crop actually was when tendered and delivered as aforesaid.*[12] *Said hops were of substantially the average quality of such Oregon cluster hops actually accepted in 1947 by the hop trade generally and by defendant under contracts containing the same type of quality provisions.*[13] *Defendant found that a portion of said crop was acceptable, and in fact the entire crop was substantially of the same quality as the part thereof which defendant found acceptable.*[14] *Said hops upon tender and delivery as aforesaid substantially conformed to the quality provisions of said agreement.*"[15]

Asserted error No. 11 (Applt's Br. 13-14) to finding that plaintiff delivered the identical hop crop which defendant contracted to buy. There is no question but that the hop crop from the specified premises was delivered (G. R. 101, 107, 315; and see abstract of evidence under Finding 7, pp. vi-viii,

above). Appellant contends here (Br. 13-14) only that the contract was not for the crop (see abstract of evidence, pp. ii-iii, above), and that the crop was not of good quality (see abstract of evidence, pp. vii-viii, above).

Asserted error No. 12 (Applt's Br. 14, 37-38) to finding that plaintiff did not rely on any warranty. Appellant contracted to buy the hops within two weeks of harvest, and the slight touch of mildew was then apparent and known to the buyer. (G. R. 88-98; and see pp. iv-v, vi, x, above.)

Asserted error No. 13 (Applt's Br. 14-15) to finding that the hops conformed to the quality provisions of the contract as those provisions were actually applied in practice. In former years hops were usually bought and sold on the basis of several grades, and "prime" was an average grade of merchantable hops (G. R. 284; and see *Lachmund v. Lope Sing,* 54 Or. 106, 109-110, 102 Pac. 598, 599). Now there is no other grade, and all grower-dealer contracts, other than spot purchases on samples, speak of "prime quality" (G. R. 283-284, 357, 486). There is no fixed standard for the term "prime" (S. R. 309-310; W. R. 458-459). It is usually understood to mean a good merchantable hop—a hop that moves in the normal channels of trade—an average hop traded in under "prime quality" contracts in that year and locality (G. R. 469, 284, 240-241, 188-189).

Contrary to the prevailing acceptation of the term, however, some of the older buyers' agents, such as Mr. Ray, still attempt to distinguish between "prime hops" and "good, merchantable hops" (G. R. 491; W. R. 224). Mr. Ray thought that a "prime" hop

could not show any mildew, and could not have over 6% leaf and stem content (W. R. 241-242). Nevertheless he admitted that mildewed hops, and hops showing 13% pick, were taken in 1947 under "prime quality" contracts (W. R. 241-242). Some of Mr. Ray's own hops that year were mildewed, showed 12% leaf and stem content, were taken by the hop buyer, and were resold to breweries (W. R. 456-457; W. Ex. 17).

The record abundantly shows that as a general practice hops with a touch of mildew, such as these, and covered by "prime quality" contracts, such as this, were in fact accepted by the hop dealers (W. R. 93, 124-125, 138-139, 152-153, 241-242, 315-316, 329-330, 455-457; W. Ex. 3-W; S. R. 191; G. R. 223-224, 240-241).

Asserted error No. 14 (Applt's Br. 15) to finding that defendant found a portion of the crop acceptable, and that the entire crop was of substantially the same quality. Mr. Oppenheim telegraphed to Mr. Paulus (G. Ex. 26):

> "Received thirteen samples lot 79 Geschwill crop. All samples show many blighted hops but samples of bales 70, 100 and 130 decidedly better than other samples. Willing accept any bales reasonably free of blighted hops and equal to these three samples. Reject balance account not being prime delivery."

Mr. Paulus, on re-examining the samples, found that all the samples showed the same general characteristics throughout (G. R. 360). He found that, while some part of the three samples might show a little more brightness, the slight difference was not

material (G. R. 356). Mr. Geschwill, who looked at the samples with Mr. Paulus, agreed and stated that he could not see any difference in those three bales as compared with the rest of them (G. R. 118-119, 183, 336). Mr. Faulhaber likewise could not see any difference (G. R. 201-203).

At the time he examined the full line of hops at the warehouse Mr. Fry made a complimentary remark to Mr. Fournier and Mr. Geschwill to the effect that the lot was one of the best he had taken in that year (G. R. 110, 161, 195). On trial Mr. Fry did not remember that comment, but talked about how some of the bales showed the slight variation in brightness which Mr. Paulus found immaterial. Opposed to Mr. Fry's testimony are the opinions of Mr. Paulus, Mr. Geschwill and Mr. Faulhaber, referred to above.

When the hops were re-sold, under the conditions imposed by appellant (G. Ex. 28), they were inspected by Mr. Becker and he found that they ran uniform to the type sample (G. R. 287-288).

Asserted error No. 15 (Applt's Br. 15) to finding that upon tender and delivery the hops substantially conformed to the quality provisions of the contract. This finding is clearly supported by the evidence referred to above, pp. vii-viii, xv-xx.

Finding "13. Hops are of a perishable nature; *there had been a material decline in the general market price and demand for 1947 Oregon Cluster hops; and the hops here involved could not readily be resold.*[16] After this action was instituted, and after defendant had been *in default*[17] in the payment of said price an unreasonable time, plaintiff

found that said hops could be resold for a fair price. Said resale was made pursuant to the stipulation between the parties of March 30, 1948. By said stipulation, upon certain conditions imposed by defendant, which conditions were met, defendant did not object to the resale and released the chattel mortgage. Ninety bales were resold on April 1, 1948, for $7,027.13 and the remaining forty bales were resold on April 16, 1948, for $3,090.38, and said prices were the best prices then obtainable for said hops. Of the total sum of $10,117.51 plaintiff received $6,117.51 and $4,000.00 was held under the stipulation by the stakeholder for the account of defendant pending this litigation. Said resale proceeds were properly credited against the sum due plaintiff from defendant, and the then remaining balance was:

Contract	$25,209.20
Advance payment	4,000.00
Amount due plaintiff from defendant on Oct. 31, 1947..........................	$21,209.20
Interest thereon to April 1, 1948, at 6% per annum	528.49
Balance	$21,737.69
Resale proceeds received by plaintiff...	3,027.13
	$18,710.56

Interest thereon to April 16, 1948, at 6% per annum	46.00
Balance	$18,756.56
Resale proceeds received by plaintiff...	3,090.38
Balance on April 16, 1948...............	$15,666.18[17]

No part of said balance has been paid."

Asserted error No. 16 (Applt's Br. 15) to findings that the market declined, and that hops could not readily be resold.

(a) Decline in market. Early in the 1947 hop-growing season it appeared that there would be a full crop of Oregon hops and the contract price then offered by the buyers was 45 cents (G. R. 244; S. R. 190-191). In the summer there was unusual mildew in the Oregon yards, brought on by the rainy weather (G. R. 369; W. R. 340-341). It then looked as if there would be a short crop, and the prices offered by the buyers advanced very rapidly up to 65 cents and then to 85 cents, with a 5 cent premium for the less-mildewed fuggles (G. R. 245-246; S. R. 192-193, 240, 311; W. R. 340-341). The yards generally made a second bloom, and the production turned out to be about normal (G. R. 246-247, 274; W. Ex. 14).

The base price was at 85 cents in September (Finding 9). After the bale count for Oregon was known in October, the price was said to remain the same, but there was no active market, the few purchases then made being principally overages on existing contracts (G. R. 246-247, 404-405, 418-420;

W. R. 225). The number of hop brokers to whom growers can sell has become limited in recent years (G. R. 252, 422, 447; S. R. 288; W. R. 460), and the brokers wanted to retain the appearance of that price level as a basis for resales to brewers (G. R. 247). The growers' price for 1947 clusters subsequently declined to as low as 20 cents (G. R. 358), and hops were hard to market because the production had met the brewers' requirements (G. R. 249-251). The hops involved in this case were resold, under stipulation, in April, 1948, for 37½ cents, which was then the fair market price for prime-quality 1947 clusters (G. R. 132, 250, 272-273).

(b) The hops could not readily be resold, according to the testimony, for the following reasons: (1) After appellant had finally determined late in the year not to pay for the hops, the market was very limited. (2) Once a lot of hops has been rejected by one dealer, whether rightly or wrongly, it is difficult to interest another dealer in them. (3) As a matter of practice dealers will not consider hops which, as in this case, are covered by contract and chattel mortgage of another dealer. (4) Appellant's chattel mortgage appeared as a purported lien of record, and appellant would not release the mortgage except upon certain material conditions not authorized by the contract. (Subdivision (a) above; G. R. 122-126, 188, 249-251, 461, 489; G. Ex. 28; W. R. 134.)

Asserted error 17 (Applt's Br. 15-16) to finding that appellant was in default in payment of price, which was due and owing. Appellant's contention here (Br. 15-16) is the same objection to quality considered above, pp. vii-viii, xv-xx.